Digest and Decisions of the Employees' Compensation Appeals Board

U.S. Department of Labor
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Employees' Compensation Appeals Board

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Alternate Board Members:
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October 1, 1987 - September 30, 1988
Volume 39 - Book 1
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PREFACE

The Employees' Compensation Appeals Board was established in 1946 as a three-member, quasi-judicial body within the Federal Security Agency in accordance with the provisions of Reorganization Plan No. 19 of 1946, effective July 16, 1946.

Reorganization Plan No. 19 of 1950, effective May 24, 1950, provided for the transfer of the Board and its functions to the Department of Labor, and the transfer to the Secretary of Labor of the functions of the Federal Security Administrator with respect to the Board.

The Board has authority to hear and, subject to applicable law, make final decisions on appeals taken from determinations and awards with respect to claims of employees of the Federal Government arising out of the Federal Employees' Compensation Act of 1916, as amended and extended.[1] The Board's jurisdiction is strictly appellate in nature and extends to questions of law and fact and to questions concerning the exercise of discretion. The review is made upon the case record. New evidence is neither received nor considered by the Board.

The administration of the Federal Employees' Compensation Act is the responsibility of the Office of Worker' Compensation Programs which, prior to July 2, 1974, was known as the Office of Federal Employees Compensation.[2]

The decisions reported in this volume were issued during the period from October 1, 1987 to September 30, 1988. This volume contains only those cases having precedential value. Routine cases which follow earlier established precedents have not been included. Likewise, most of the Board's orders (decisions issued without opinions) have been excluded. The majority of these orders set aside the decisions of the Office of Workers' Compensation Programs in the particular case and remanded it, either on the Board's own initiative or on motion of the Office, to correct legal or procedural error or for further development from an evidentiary standpoint.

The Board has continued the practice begun in Volume 35 of combining the decisions and index digest into a single, consolidated volume. The current index digest section follows as closely as possible the format and topic headings of the original index digest. This section is composed of headnotes to the printed decisions. These headnotes are not to be regarded as adding to or modifying the results or text of the decisions in any manner. They are intended merely as a tool to assist in the use of the volume.

Docket numbers are assigned on a fiscal year basis. Thus 88-01 was the first case filed in fiscal year 1988, which commenced on October 1, 1987.

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[1] Title 5, United States Code, section 8101 *et seq.* With respect to employees of the District of Columbia Government, effective May 3, 1979, all functions previously performed by the Secretary of Labor and the Employees Compensation Appeals Board under the Federal Employees Compensation Act, 5 U.S.C. 8101 *et seq.*, were transferred to the Mayor of the District of Columbia.

[2] In the case of employees of the Canal Zone Government and of the Panama Canal Company, the administrator was the Governor of the Canal Zone. However, effective October 4, 1979, Title 5 United States Code 8101 *et seq.* became inapplicable to any individual (1) who is not a citizen of the United States, (2) whose initial appointment by the Commission occurs after October 1, 1979; and (3) who is covered by the Social Security System of the Republic of Panama pursuant to any provision of the Panama Canal Treaty of 1977 and related agreements. Sec. 1209(a), P.L. 96-70; 93 Stat. 463.

Digest of Decisions of the Employees' Compensation Appeals Board

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U.S. Department of Labor
Employees' Compensation Appeals Board
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ABUSE OF DISCRETION (SEE OFFICE)

ATTORNEY'S FEE

It is not the Board's function to determine the fee for representative services performed before the Office. That is a function within the discretion of the Office based on criteria set forth in 20 C.F.R. section 10.145 and mandated by Board decisions. The Board's sole function is to determine whether the action of the Office constituted an abuse of discretion. Eugene F. Carbonneau, 39 ECAB 392 (1988); Azalee L. McCoy, 39 ECAB 786 (1988); Edward Snider, 39 ECAB 1268 (1988).

The FECA and the Office's implementing regulations provide that a representative's fee must be approved in order to be a valid and collectable fee. Criminal sanctions are imposed upon a representative who collects a fee without prior approval of the Office. The Board concluded that the Office is not prohibited from approving a fee after a fee has been collected from a claimant and overruled the case of *Hazel Covington*, 25 ECAB 215 (1974) wherein the Board held that it was improper for the Office to approve a fee while attorneys held money which had been collected from a claimant without prior approval. Eugene F. Carbonneau, 39 ECAB 392 (1988).

The attorney requested a combined fee for three separate claims filed by the employee. The Office informed the attorney that it would not consolidate the attorney fee as the three claims were for different and unrelated conditions. The attorney was requested to submit separate itemizations for each claim; however, a separately itemized fee was not submitted. The Board affirmed the attorney fee approved by the Office. Since the attorney refused to submit separate itemizations of the time spent on each claim, the Office was not able to compare the requested fee to the appropriate case file in order to determine whether it was reasonable. Azalee L. McCoy, 39 ECAB 786 (1988).

The attorney had represented an employee who received a schedule award. The Office approved the attorney's requested fee representing 47.75 hours of work and the attorney accepted the fee payment. The employee was subsequently granted a schedule award for one percent additional impairment and the attorney requested an increase in the approved attorney fee. The Office denied the attorney's request to modify his attorney fee. The Board found that the agreement of the attorney and the employee to the original stated fee amount and the acceptance by the attorney of this fee resulted in an accord and satisfaction of the attorney's claim for the 47.75 hours of services rendered. Edward Snider, 39 ECAB 1268 (1988).

BURDEN OF PROOF

CLAIMANT

A person who claims benefits under the FECA has the burden of establishing the essential elements of his or her claim. The claimant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specified conditions of the employment. As part of this burden, the claimant must present rationalized medical opinion evidence based upon a complete factual and medical background showing causal relationship. The mere fact that a condition manifests itself or is worsened during a period of employment does not raise an inference of causal relationship between the two. Such a relationship must be shown by rationalized medical evidence of causal relation based upon a specific and accurate history of employment incidents or conditions which are alleged to have caused or exacerbated a disability. Steven R. Piper, 39 ECAB 312 (1987); Nino V. DiGrezio, 39 ECAB 366 (1988); Jill Thimmesch, 39 ECAB 688 (1988); Johnson K. Yazzie, 39 ECAB 701 (1988); Earl D. Price, 39 ECAB 1053 (1988); Orlando Vivens, 39 ECAB 1079 (1988); Lawrence E. Bennett, 39 ECAB 1110 (1988); Michael Stockert, 39 ECAB 1186 (1988); Velta H. Mikelsons, 39 ECAB 1278 (1988); Richard F. Hines, 39 ECAB 1431 (1988).

To have a compensable claim under the FECA, a claimant must have sustained disability; sustained a loss of wage-earning capacity or a permanent impairment due to an employment injury; have been denied benefits available under the Act such as medical benefits, vocational rehabilitation or continuation of pay; have had compensation terminated or suspended; or had an overpayment of compensation declared for which recovery is sought. Neither the Board nor the Office should consider a hypothetical or abstract claim for disability, wage loss or other benefits available under the Act. Russell D. Knowles, 39 ECAB 380 (1988).

A compensation award may not be based upon speculation, surmise or conjecture; or stated differently, the award must be based upon evidence, and where an inference, deduction or conclusion is drawn, there must be evidence to support such inference, deduction or conclusion. The evidence required, however, is only that necessary to convince the adjudicator that the conclusion drawn is rational, sound and logical. It is not necessary that the evidence be so conclusive as to suggest causal connection beyond all possible doubt in the mind of a medical scientist. Shirloyn J. Holmes, 39 ECAB 938 (1988); Lowell Spicer, 39 ECAB 1017 (1988).

Appellant, a speech pathologist, received compensation benefits due to an employment related back injury. Following the termination of his compensation benefits, appellant alleged that he was having difficulty at his present job and that the physical requirements of the job had resulted in his reinjuring his back. The Board noted that since appellant continued to work as a speech pathologist, he had not established entitlement to any disability, wage loss or other benefit under the Act. Compensation benefits cannot be awarded for prospective or possible disability in the future. Russell D. Knowles, 39 ECAB 380 (1988).

Appellant, a letter carrier, alleged a low back injury while lifting a relay bag. The Board found that appellant failed to establish the essential elements of her claim as appellant did not provide a detailed description of how her injury occurred nor did she submit any medical evidence which provided a rationalized statement showing causal relation between the alleged employment incident and her low back condition. Jill Thimmesch, 39 ECAB 688 (1988).

Appellant was involved in an employment-related motor vehicle accident and sustained head, neck and back injury. The Office accepted appellant's claim for a trapezius strain (whiplash); appellant was released to return to work one month following injury. Appellant thereafter alleged loss of memory and headaches which he related to the employment injury. A majority of the Board found that appellant did not sustain his burden of proof by submitting sufficient medical evidence which related his disabiling condition to the accepted employment injury. Johnson K. Yazzie, 39 ECAB 701 (1988).

Appellant established that his right leg cellulitis condition was causally related to an employment injury in which he slipped on the step of a snowblower and bumped the inside of his right leg. The decision of the Office rejecting the claim was reversed as the medical evidence from appellant's physicians noted that the soft tissue death and secondary infection would not occur spontaneously without an etiologic agent. Lowell Spicer, 39 ECAB 1017 (1988).

The Board found that appellant sustained her burden of proof in establishing that her back condition and disability commencing January 13, 1987 was causally related to a January 10, 1987 employment injury. There was no opposing medical evidence and the "relative circumstances" of the case were found to strongly suggest a causal relation. Orlando Vivens, 39 ECAB 1079 (1988).

Appellant did not sustain his burden of proof by submitting rationalized medical opinion evidence of causal relationship based upon a specific and accurate history of employment incidents or conditions which were alleged to have caused his left knee condition. Lawrence E. Bennett, 39 ECAB 1110 (1988).

The Board found that appellant failed to submit rationalized medical evidence supportive of a causal relationship between his hernia condition and the alleged employment incident of lifting and carrying a mail tray. Michael Stockert, 39 ECAB 1186 (1988).

Appellant submitted voluminous medical reports supporting the fact that she had bilateral carpal tunnel syndrome. The issue, however, was whether the medical evidence of record established that appellant's condition was causally related to factors of her federal employment. None of the physician's reports provided a reasoned medical opinion explaining how appellant's condition developed from her employment. Velta H. Mikelsons, 39 ECAB 1278 (1988).

Investigation or inquiry by Office

While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source. Henry Ross, Jr., 39 ECAB 373 (1988); Richard A. Patterson, 39 ECAB 662 (1988); Willie James Clark, 39 ECAB 1311 (1988).

Modification of award

Once the Office accepts a claim and pays compensation, it has the burden of justifying the termination or modification of compensation benefits. This holds true where, as here, the Office later decides that it erroneously accepted a claim. Robert C. Fay, 39 ECAB 163 (1987); Thomas Lindsey, 39 ECAB 562 (1988); Hope J. Kahler, 39 ECAB 588 (1988).

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment. Adina D. Blanco, 39 ECAB 510 (1988); Pauline Brown, 39 ECAB 578 (1988); Maria Kunsman, 39 ECAB 977 (1988); Calvin S.

Mays, 39 ECAB 993 (1988); Velta H. Mikelsons, 39 ECAB 1278 (1988); Vito S. Caprio, 39 ECAB 1299 (1988); Gurchuran Dehal, 39 ECAB 1398 (1988).

Claimant alleged an emotional condition as a result of his federal employment as a principal/teacher in Stebbins, Alaska with the Bureau of Indian Affairs. His claim was accepted by the Office for a temporary situational anxiety neurosis. The Office subsequently ordered that appellant's compensation award be rescinded finding that his emotional condition was not caused by "factors of the actual employment activity" but rather by appellant's "interpersonal relationships with members of the [native] community." The Office determined that the entire amount of appellant's compensation was an overpayment. The Board reversed the findings of the Office and noted that the decision failed to address specific employment factors alleged by appellant which indicated that his responsibilities in Stebbins required interaction with members of the community outside the classroom. The rescission of appellant's disability compensation benefits was not justified as the Office failed to furnish a complete description of appellant's duties as a principal/teacher or show how his disability was not the result of his assigned responsibilities. Robert C. Fay, 39 ECAB 163 (1987).

The Office had accepted appellant's claim for an adjustment disorder; however, before the Office paid any compensation benefits, it modified its original decision and rejected appellant's claim on the basis of performance of duty. As no compensation benefits had been paid, the Office contended that it did not have the burden of proof in terminating appellant's compensation benefits. The Board held that once the Office accepts a claim it has the burden to prove that either the disability has ceased or that the claim was erroneously accepted. It is at this point that a claimant begins to rely upon the payment of compensation benefits and it is unjustifiable for the Office to rescind its acceptance without good reason. The Office's contention that it must actually "pay" compensation before it has the burden to revoke or terminate compensation was deemed purely gratuitous. Thomas Lindsey, 39 ECAB 562 (1988).

The medical evidence from the impartial medical referee was sufficient to support the Office's decision which terminated appellant's compensation based on the finding that she had no disability causally related to her accepted employment injury. Maria Kunsman, 39 ECAB 977 (1988).

The Office properly terminated appellant's medical benefits on the basis that his urological condition was not employment related. The Office met its burden of proof to terminate its acceptance of appellant's urological condition as the weight of medical evidence established that appellant had no current objective findings of a urological condition underlying his subjective complaints. Further, the Board found that the medical evidence did not establish that medical expenses incurred for surgical treatment of appellant's transurethral resection were for treatment of an employment-related condition. Calvin S. Mays, 39 ECAB 993 (1988).

The Office failed to sustain its burden of proof in establishing that appellant's back disability causally related to employment injuries in 1974 and 1976 had ceased. The Office had characterized the opinion from a referral physician as that of an impartial medical specialist; however, the Board found that the referral physician could not serve as an impartial specialist because he was not selected in conformance with established Office procedures. Further, the evidence established that the referral physician was associated with a medical clinic at which appellant was a patient. The Board reversed the termination of appellant's compensation benefits. Velta H. Mikelsons, 39 ECAB 1278 (1988).

The Office did not sustain its burden of establishing that appellant's accepted condition of permanent aggravation of degenerative osteoarthritis of the right knee had ceased. The Office did not provide any evidence showing that its original determination accepting the aggravation of appellant's preexisting right knee condition was erroneous or which showed that appellant's alleged increasing disability was not related to the accepted condition Vito S. Caprio, 39 ECAB 1299 (1988).

NOTIFICATION OF MATERIAL CHANGES

Informing another person or organization of material information relevant to an employee's receipt of compensation benefits with the belief that such information will be conveyed to the Office does not fulfill the employee's obligation that he or she inform the Office directly of changes material to the receipt of compensation benefits. Otilio Leon, 39 ECAB 652 (1988).

OFFICE OF WORKERS COMPENSATION PROGRAMS

The Office may terminate or suspend compensation benefits only under certain specified circumstances: when a claimant refuses an offer of suitable employment; when the Office establishes that the disability for which compensation has been paid has ceased or is no longer causally related to the employment injury; when a claimant refuses to assign or prosecute an action in his own name as required by the Secretary under section 8131(b) of the Act; and under section 8123 of the Act when a claimant fails to undergo or obstructs a scheduled medical examination. William C. Austin, 39 ECAB 357 (1988).

RECURRENCE OF DISABILITY

Where an employee claims a recurrence of disability due to an accepted employment-related injury, he or she has the burden of establishing by the weight of the substantial, reliable and probative evidence that the recurrence of the disabling condition for which compensation is sought is causally related to the accepted employment injury. As part of this burden, the employee must submit rationalized medical evidence based on a complete and accurate factual and medical background showing a causal relationship between the current disabling condition and the accepted employment-related condition. Charles H. Tomaszewski, 39 ECAB 461 (1988); Herman W. Thornton, 39 ECAB 875 (1988); Jessie Johnson, Jr., 39 ECAB 945 (1988).

Appellant alleged a recurrence of a 1983 right knee injury. The Board found that the medical evidence submitted by appellant in support of his claim was not based on an accurate factual and medical background of the case and did not contain rationalized medical opinion establishing a causal relationship between appellant's claimed recurrent knee condition and his accepted employment-related injury. Charles H. Tomaszewski, 39 ECAB 461 (1988).

Appellant alleged a recurrence of a 1985 back sprain. The Board found that appellant failed to submit sufficient medical evidence which provided a physician's opinion, with supporting rationale, supporting the causal relationship between appellant's claimed recurrent back condition and the accepted employment injury. Herman W. Thornton, 39 ECAB 875 (1988).

The Board found that the medical evidence of record was sufficient to establish that appellant's condition of tendinitis was a recurrence of an employment-injury to her right shoulder, and that her disability for work was employment-related. Shirloyn J. Holmes, 39 ECAB 938 (1988).

Appellant alleged that his limb girdle dystrophy condition was causally related to his accepted right knee condition. The Board found that appellant did not establish that the limb girdle dystrophy was a consequential injury related to the accepted employment injury. Jessie Johnson, Jr., 39 ECAB 945 (1988).

Return to duty

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements. George DePasquale, 39 ECAB 295 (1987); Jackie B. Wilson, 39 ECAB 915 (1988).

Appellant, a letter carrier, established that his injury-related back and knee conditions prevented him from performing the light duty job he had been assigned. The Board reversed the determination of the Office that appellant was capable of performing his light duty assignment finding that the medical evidence established that appellant's degenerative arthritis was worsened by his employment injuries. George DePasquale, 39 ECAB 295 (1987).

Appellant, a pipefitter with a history of low back injuries, sustained a low back strain superimposed on a preexisting condition of spondylolisthesis. He returned to limited duty under restrictions. Appellant was terminated from employment on the grounds that the employing establishment no longer had work within his physical limitations and appellant alleged a recurrence of employment-related disability. The Board found that appellant met his burden of establishing a recurrence of total disability noting that as no light duty was available to appellant, the nature and extent of his light-duty job requirements had changed and he was totally disabled for the job he held when injured. Jackie B. Wilson, 39 ECAB 915 (1988).

CAUSAL RELATION

Aggravation of preexisting condition

Where employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for periods of disability related to the aggravation. However, where the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased. This is true even though the employee is found medically disqualified to continue in such employment because of the effect which the employment factors might have on the underlying condition. Under such circumstances, the employee's disqualification for continued employment is due to the underlying condition without any contribution by the employment. James Bain, Jr., 39 ECAB 455 (1988); Richard T. DeVito, 39 ECAB 668 (1988); Gaeten F. Valenza, 39 ECAB 1349 (1988).

The Board found that appellant was entitled to compensation only for the period of temporary aggravation of his underlying allergic rhinitis attributable to his federal employment. The medical evidence established that appellant's employment-related aggravation had ceased and the Office properly determined he was no longer entitled to compensation benefits. Richard T. DeVito, 39 ECAB 668 (1988).

The Board found that the case was not in posture for decision on whether factors of appellant's employment caused a temporary or permanent aggravation of his preexisting conditions of hypertension, peptic ulcers and diabetes. The Board noted that a conflict in medical opinion was created which necessitated the referral of appellant to an impartial medical specialist; however, the Board found that the medical report obtained from the impartial specialist was not sufficiently rationalized and required further clarification. The case was remanded for further development of the medical evidence. Newton Ky Chung, 39 ECAB 919 (1988).

PROOF REQUIRED

The opinion of a physician that a condition is causally related to an employment injury because the employee was asymptomatic before the employment injury is insufficient, without supporting medical rationale, to establish causal relation. Thomas D. Petrylak, 39 ECAB 276 (1987).

Appellant, a letter carrier, was bitten on the left calf by a dog. He sustained a superficial laceration to his leg and returned to light duty. Appellant subsequently stopped work alleging symptoms of dizziness, headaches, and malaise which he related to the dog bite. The Board found that the weight of medical opinion indicated that appellant's complaints did not resemble those resulting from infection with the rabies virus and held that appellant did not establish that his disability for work was due to the employment related injury. Thomas D. Petrylak, 39 ECAB 276 (1987).

CHIROPRACTORS

CONFLICT IN X-RAY INTERPRETATION

The Board found that a conflict in medical opinion existed between appellant's attending chiropractors and a Board-certified orthopedic surgeon as to whether an x-ray obtained by the chiropractors demonstrated a spinal subluxation. The Board noted that the opinion of an Office medical adviser, who only reviewed a written x-ray report and not the actual x-ray film, was not sufficient to create conflict with the attending chiropractors. The case was remanded to the Office to refer the x-ray film, together with the case record and the accepted Office definition of spinal subluxation, to a Board-certified radiologist for resolution of the conflict. Glen E. McCarthy, 39 ECAB 603 (1988).

REIMBURSABLE SERVICES (SEE ALSO MEDICAL EXPENSES)

Section 8101(3) of the FECA limits reimbursable chiropractic service to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist. Merton J. Sills, 39 ECAB 572 (1988); Jill Thimmesch, 39 ECAB 688 (1988).

The Board found that the case was not in posture for decision as the Office had not exercised its discretionary authority to determine whether CA-17 forms issued by the employing establishment constituted authorization for appellant's treatment by a chiropractor. The Board noted that although Office form CA-16 is the official form for authorizing examination or treatment at the expense of the compensation fund, in *George Witte* the Board recognized the discretionary authority of the Office to consider a CA-17 form as an authorization for medical treatment. The case was remanded to the Office for further consideration with respect to reimbursement for services rendered by appellant's chiropractor. Merton J. Sills, 39 ECAB 572 (1988); Jill Thimmesch, 39 ECAB 688 (1988).

A conflict in medical opinion as to whether x-rays of appellant's spine demonstrated a spinal subluxation was resolved by an impartial Board-certified radiologist who noted that the x-rays exhibited a minimal degree of scoliosis of the spine but who could find no subluxation as defined in the *Medicare Carrier's Manual*. For this reason the Board found that appellant's chiropractor was not a physician under the Act and his services could not be considered reimbursable medical treatment. Therefore, the question of whether his services were reasonable and necessary under the Act became moot. Marjorie S. Geer, 39 ECAB 1099 (1988).

SPINAL SUBLUXATION

The Office's FECA Bulletin No. 84-71 was issued to note the adoption by the Office of the *Medicare Carrier's Manual* definition of the term spinal subluxation as "an incomplete dislocation, off-centering misalignment, fixation or abnormal spacing of the vertebrae anatomically which must be demonstrable on any x-ray film to individuals trained in the reading of x-rays." Marjorie S. Geer, 39 ECAB 1099 (1988).

CLAIMS

To have a compensable claim under the FECA, a claimant must have a condition, defined as physical impairment arising from his or her employment, which is disabling in fact at the time for which compensation is sought and which results in a loss of wage-earning capacity. There is no provision under the Act for payment of compensation for disability arising from conditions unrelated to the employee's federal employment. Proof of sustained work and earnings, such as existed in the instant case, rebuts the presumption of continuing total disability. Neither the Board nor the Office may consider an abstract of hypothetical claim for disability and wage loss or for any other benefit available under the Act. Frances Fowler, 39 ECAB 890 (1988).

Appellant sustained injury when struck by a hand truck loaded with mail. She participated in vocational rehabilitation, accepted an offer of employment, and returned to work. After successfully returning to duty, appellant explored the possibility of a transfer to an employing establishment branch located closer to her home but never followed through with her transfer attempt. Appellant thereafter alleged that her job was unsuitable because she had to commute over 100 miles round trip to her place of employment. The Board found that appellant continued to work at the position she accepted following her vocational rehabilitation and she did not submit any medical evidence showing that her employment was unsuitable as alleged; therefore, she did not establish any entitlement to disability compensation, wage loss, or other benefits provided under the FECA. Frances Fowler, 39 ECAB 890 (1988).

COMPENSATION

AUGUMENTED (SEE ALSO DEPENDENTS)

Appellant claimed augmented compensation benefits under section 8110 of the Act because of a minor grandchild whom he had been supporting and of whom he had legal custody. The Board found that appellant's grandchild was not among the categories of persons included in the term "child" under the Act. Appellant was not eligible for augmented compensation based on his guardianship of his grandchild. Louis L. Jackson, Sr., 39 ECAB 423 (1988).

The Board found that appellant was entitled to compensation at the augmented rate of 75 percent based on evidence that he was contributing to the monthly support of his child by paying the charges for his son's attendance at a school for children with learning disabilities. This contribution was found to constitute sufficient evidence to show that appellant was making regular contributions to the support of his son which qualified his son as a dependent. Clifford C. Larson, 39 ECAB 554 (1988).

The Board found that appellant was not entitled to augmented compensation for her husband after her divorce became final. A former husband is not considered a dependent under section 8110(a)(2) of the Act. Linda F. Green, 39 ECAB 636 (1988).

The case required further development on whether appellant was entitled to augmented compensation for a wholly dependent parent. Appellant had alleged that her father was totally dependent upon her for support. The Office failed to develop this aspect of the case before issuing its final overpayment determination. Linda F. Green, 39 ECAB 636 (1988).

CONCURRENT PAYMENTS

A claimant is not entitled to dual workers' compensation benefits for the same injury. He or she may not receive compensation for temporary total disability and compensation under a schedule award covering the same period of time. Benjamin Swain, 39 ECAB 448 (1988).

COST OF LIVING INCREASES

Section 8146a of the FECA provides that compensation payable on account of disability or death which occurred more than one year before the effective date of a cost-of-living increase shall be increased by the percent of the increase. The legislative history to this section makes it clear that cost of living increases apply only in situations where an employee has already been receiving compensation for more than one year prior to the effective date of the increase. Thomas Donaghue, 39 ECAB 336 (1988).

The Board found that appellant was not entitled to a cost-of-living increase as Section 8146a was not intended to provide employees who have a recurrence of disability with cost-of-living increases dating back to their initial period of disability, which could be many years earlier. Thomas Donaghue, 39 ECAB 336 (1988).

INTEREST

Appellant asserted that the Office should pay interest on any compensation benefits due the employee's estate. There is no provision in the Act for payment of interest on awards of compensation. Payments under the Act are in the nature of grants or gratuities and are limited to the amounts and circumstances specified in the Act. The Act contains no provision which, either in specific terms or by way of implication, authorizes the payment of interest when awards of compensation are made retroactively. Steven M. Gourley (Louise E. Gourley), 39 ECAB 413 (1988).

The terms of the Act are specific as to the method and amount of payment of compensation; neither the Office nor the Board has the authority to enlarge the terms of the Act or to make an award of benefits under any terms other than those specified in the statute. There is no provision in the Act for payment on awards of compensation. For this reason, the Board found that the Office properly denied appellant's claim for interest on his retroactive award of compensation benefits. Richard T. DeVito, 39 ECAB 668 (1988).

MEDICAL BENEFITS (SEE ALSO MEDICAL EXPENSES)

The right to medical benefits for an accepted condition is not limited to the period of entitlement to disability compensation for wage-loss. An employee who has returned to duty and is earning the wage he or she was receiving when injured no longer has disability for wage-loss; however, such employee is entitled to continued medical benefits for any residual impairment related to the employment injury. Marlene G. Owens, 39 ECAB 1320 (1988).

NON-CITIZEN EMPLOYEES

Appellant, the widow of a non-citizen employee and resident of the Republic of Korea, filed a claim for death benefits. The Office computed her entitlement under both the FECA and the Korean Labor Standards Act and made a lump sum award under the FECA. On appeal, appellant contended that she was entitled to a greater payment under local law. The Board found that the Office had properly computed the maximum amount of death benefits payable to appellant. Under the FECA, compensation paid for disability or death of non-citizen employees outside the United States, whether paid under local law or under a special schedule, shall in no event exceed that amount generally payable under the Act. Lump sum payments made under section 8135 of the Act may not exceed 60 months of compensation. Mu-Hyang Ku, 39 ECAB 217 (1987).

RATE OF PAY

Section 8101(4) of the FECA provides that monthly pay means the monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than 6 months after the injured employee resumes regular full-time employment with the United States, whichever is greater. Thomas Donaghue, 39 ECAB 336 (1988).

The Board found that appellant sustained a recurrence of disability within the meaning of the third alternative of section 8101(4) and that the Office should have used appellant's monthly pay as of the date of the recurrence of disability in calculating appellant's rate of pay for compensation benefits. Thomas Donaghue, 39 ECAB 336 (1988).

COMPUTATION OF PAY

AVERAGE ANNUAL EARNINGS

Section 8114(d) of the FECA provides that the average annual earnings of an employee are to be determined, as follows: If the employee worked in the employment in which he was employed at the time of injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay (A) was fixed, the average annual earnings are the annual rate of pay; or (B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for the particular employment, or the average thereof if the daily wage has fluctuated, by 300 if he was employed on the basis of a 6-day workweek, 280 if employed on the basis of a 5½-day week, and 260 if employed on the basis of a 5-day week. Richard T. DeVito, 39 ECAB 668 (1988).

COST OF LIVING ALLOWANCES

The Board found that the payment of school fees for the decedent employee's children outside the United States constituted an "additional pay or allowance" which was authorized because of differential in the cost-of-living. This additional pay or allowance is excluded from determining the employee's monthly pay under the Act for compensation benefits. The Office properly excluded the additional pay or allowance for school fees from its computation of the employee's monthly pay for purposes of disability compensation and death benefits. 5 U.S.C. section 5924(4), the statutory basis for payment of such educational allowances, characterizes such payments as a cost-of-living allowance which is excluded from the computation of the employee's monthly pay under section 8114(e)(2) of the Act. Helen S. Forman (Lawrence T. Forman), 39 ECAB 212 (1987).

LEARNERS OR MINORS

With respect to an increase or decrease of basic compensation for a person employed in a learner's capacity or who was a minor and who was not physically or mentally handicapped before the injury, the FECA provides that compensation due and owing should be reviewed when the wage-earning capacity of the person would probably, but for the injury, have increased; the monetary compensation payable for disability should be prospectively recomputed on the basis of an assumed monthly pay corresponding to such probable increased wage-earning capacity. Carlos E. Martinez, 39 ECAB 821 (1988); John Olejarski, 39 ECAB 1138 (1988).

The FECA contemplates one probable increase in wage-earning capacity upon a learner's completion of training or a minor's reaching the age of majority but does not contemplate such factors as future promotions, increases in salary, or advancements, as these rest upon a number of indefinite and uncertain contingencies which place the happening of an event in the realm of possibility, not probability. Carlos E. Martinez, 39 ECAB 821 (1988); John Olejarski, 39 ECAB 1138 (1988).

The Board found that appellant was not entitled to additional compensation benefits as he was not a minor. Further, appellant was not employed as a learner at the time of his injury as he was not participating in a formal training program with a specified period for completion after which he would have automatically been promoted to a higher grade. Appellant's status was no different from any regular employee in that the opportunity for advancement to a higher grade was dependent upon his demonstrated ability and the availability of a position. Carlos E. Martinez, 39 ECAB 821 (1988).

Appellant was injured at work while in the position of an apprentice welder. The Office properly found that appellant's wage-earning capacity was that of a journeyman welder, the position appellant would have advanced to upon completion of his training. Appellant contended that his wage-earning capacity should have been based on the position of a welder supervisor which he claimed he would have advanced to after numerous promotions based on his skill, experience and history of work performance. The Board noted that the possibility of future promotions or greater earnings, but for an employment injury, does not support a loss of wage-earning capacity. John Olejarski, 39 ECAB 1138 (1988).

Seasonal employment

Appellant's job as a mixed gang foreman for the Alaska Area Native Health Service was found to be seasonal employment. He did not work for substantially the whole year in 1981, the year preceding his 1982 injury, nor was his position one which would have afforded him employment for substantially a whole year. Therefore, section 8114(d)(3) was the applicable section of the Act for determining appellant's average annual earnings. The Board found that the Office properly computed appellant's compensation rate pursuant with the Act. George A. Mercurio, 39 ECAB 1447 (1988).

CONTINUATION OF PAY

Termination

Once the Office authorized payment of continuation of pay to an employee disabled as a result of a traumatic injury, such payment may not be terminated until: (1) the agency receives medical information from the attending physician to the effect that the employee is no longer disabled; or (2) the agency receives notification from the Office that pay should be terminated; or (3) the expiration of 45 days. The Office's Procedure Manual allows for termination of continuation of pay where an employee is found to be partially disabled, provided: (1) the employee returns to full time suitable light duty without official reassignment and with no pay loss; or (2) the physician's report indicates that the employee is capable of performing light duty which therefore obligates the employee to accept any reasonable offer of suitable light or limited duty. Jack Sucic, 39 ECAB 1338 (1988).

The Board found that the Office improperly denied continuation of pay to appellant for the period of his partial disability for work. The Office authorized termination of continuation of pay on the basis that appellant was no longer disabled; however, the medical evidence from his attending physician stated that appellant was partially disabled. The physician did not state that appellant was capable of light or limited duty work and the record was devoid of any evidence that light or limited duty was available or that the employing agency made a reasonable offer of such duty and that the offer was refused. Therefore, the Office could not deny continuation of pay for the period of appellant's partial disability. Jack Sucic, 39 ECAB 1338 (1988).

TIME LIMITATION

Section 8118 of the FECA provides for payment of continuation of pay, not to exceed 45 days, to an employee who filed a claim for a period of wage loss due to traumatic injury with his immediate superior on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2) of the Act. The latter section provides that written notice of injury shall be given within 30 days. The context of section 8122 makes clear that this means within 30 days of the injury. Nicholas A. Dalo, 39 ECAB 506 (1988).

The Board found that appellant's claim for continuation of pay was barred by the time limitation provisions of the Act. Oral notification to the employing establishment of an employment-related injury within 30 days of the injury is not sufficient to constitute notice of injury for continuation of pay purposes within the requirement of section 8118. The context of this section makes it clear that in order to benefit under the provisions of section 8118, an employee must file written notice of the injury and words of claim must be included in such notice. The Board noted that the only document of record which consituted a claim was the form CA-1 dated and filed by appellant more than 30 days after his employment injury. Nicholas A. Dalo, 39 ECAB 506 (1988).

DEATH BENEFITS

COST-OF-LIVING ALLOWANCES

The Board found that the payment of school fees for the decedent employee's children outside the United States constituted an "additional pay or allowance" which was authorized because of differential in the cost-of-living. This additional pay or allowance is excluded from determining the employee's monthly pay under the Act for compensation benefits. The Office properly excluded the additional pay or allowance for school fees from its computation of the employee's monthly pay for purposes of disability compensation and death benefits. 5 U.S.C. section 5924(4), the statutory basis for payment of such educational allowances, characterizes such payments as a cost-of-living allowance which is excluded from the computation of the employee's monthly pay under section 8114(e)(2) of the Act. Helen S. Forman (Lawrence T. Forman), 39 ECAB 212 (1987).

NON-CITIZEN EMPLOYEES

Appellant, the widow of a non-citizen employee and resident of the Republic of Korea, filed a claim for death benefits. The Office computed her entitlement under both the FECA and the Korean Labor Standards Act and made a lump sum award under the FECA. On appeal, appellant contended that she was entitled to a greater payment under local law. The Board found that the Office had properly computed the maximum amount of death benefits payable to appellant. Under the FECA, compensation paid for disability or death of non-citizen employees outside the United States, whether paid under local law or under a special schedule, shall in no event exceed that generally payable under the Act. Lump sum payments made under section 8135 of the Act may not exceed 60 months of compensation. Mu-Hyang Ku, 39 ECAB 217 (1987).

PERFORMANCE OF DUTY

The employee died while attending a conference on brain research in Keystone, Colorado where he was to present the results of employing establishment research. He collapsed due to cardiac arrest while skiing. The Board found that the employee's death did not occur in the performance of duty. The Board noted that the employee was within the performance of duty while attending the conference and related professional meetings as such activities were contemplated as incidental to the employment; however, the employee died while engaged in recreational activities which were not a regular incident of his employment. The fact that the recreational activity occurred at the site of the conference was not by itself sufficient to show that the employee's death was in the performance of duty. Lindsay A.C. Moulton (Dr. David G. Moulton), 39 ECAB 434 (1988).

SURVIVING CHILDREN

The Act allows for death benefits to a surviving child of an employee whose death resulted from a work-related injury if the child is under 18 years of age or if over 18 and incapable of self-support. James H. Woods (James B. Woods), 39 ECAB 499 (1988).

Appellant, the deceased employee's son, filed a claim for death benefits alleging that he was incapable of self-support. The medical evidence did not support that appellant, who was 43 years old and unemployed, was mentally incompetent or that he was physically totally disabled. Appellant's appointment as executor of the employee's estate and his management of the claim for death benefits on behalf of the employee's widow was evidence that appellant was mentally capable. James H. Woods (James B. Woods), 39 ECAB 499 (1988).

DEPENDENTS

CHILD

The FECA provides that the term "dependent" includes an unmarried child while living with the employee or receiving regular contributions from the employee towards his or her support. The term "child" is further defined to mean one who is under 18 years of age or over that age and incapable of self-support, and includes step-children, adopted children, and posthumous children, but does not include married children. Louis L. Jackson, Sr., 39 ECAB 423 (1988).

Appellant claimed augmented compensation benefits under section 8110 of the Act because of a minor grandchild whom he had been supporting and of whom he had legal custody. The Board found that appellant's grandchild was not among the categories of persons included in the term "child" under the Act. Appellant was not eligible for augmented compensation based on his guardianship of his grandchild. Louis L. Jackson, Sr., 39 ECAB 423 (1988).

HUSBAND

The Board found that appellant was not entitled to augmented compensation payments after her divorce from her husband. After her divorce became final, her husband is no longer considered a dependent under section 8110(a)(2) of the Act. The Act specifies the term husband as a dependent under one of three alternative situations, but did not specify as a dependent a former husband following a divorce. Linda F. Green, 39 ECAB 636 (1988).

Appellant was not entitled to augmented compensation payments after her husband died. She failed to promptly notify the Office as to her change in dependent status and was found at fault in the creation of an overpayment of compensation. Madge H. Gurr, 39 ECAB 1124 (1988)

PARENTS

The Board found that the case required further development on the issue of whether appellant was entitled to augmented compensation for a "wholly dependent" parent. Following the Office's preliminary overpayment determination, appellant alleged that her father was wholly dependent upon her for support. In the absence of any other evidence, it was improper for the Office to issue a final overpayment decision without considering appellant's contention. Linda F. Green, 39 ECAB 636 (1988).

WIFE

The Board found that appellant could not claim augmented compensation payments for his wife after the couple separated prior to divorce. Section 8110(a)(1) states that a wife may be considered a dependent under one of three alternative situations. Appellant separated from his wife and was not making regular contributions to her support nor had a court ordered him to contribute to her support. Appellant's wife was not found to be a dependent and an overpayment of compensation was created as appellant was paid compensation at the augmented rate. Walter T. Chester, 39 ECAB 771 (1988).

DERMATOLOGICAL (SKIN) CONDITIONS

Appellant, an industrial equipment mechanic, alleged his facial and scalp rash and chest pain were due to hazardous chemical exposure in his federal employment. The evidence established that appellant had significant skin and inhalation exposure to the chemical 1, 1, 1, trichloroethane. While the medical reports submitted by appellant were not sufficient to establish that his facial dermatitis and related symptomatology were related to a specific toxic exposure, the Board found that further development of the evidence was necessary and instructed the Office to obtain health monitoring examinations performed on appellant by the employing establishment together with industrial hygiene air monitoring surveys and a list of all chemicals to which appellant was exposed. Thereafter, the Office was instructed to refer appellant to a Board-certified specialist for an opinion on the causal relationship. Richard A. Patterson, 39 ECAB 662 (1988).

DISABILITY

The term "disability" as used in the FECA means the incapacity because of injury in employment to earn the wages which the employee was receiving at the time of injury. The general test for determining loss of wage-earning capacity is whether injury-related impairment prevents the employee from performing the kind of work he or she was doing when injured. Richard T. DeVito, 39 ECAB 668 (1988); Marlene G. Owens, 39 ECAB 1320 (1988); Elmer R. Poland, 39 ECAB 1367 (1988); John W. Normand, 39 ECAB 1378 (1988); Ralph W. Baker, 39 ECAB 1413 (1988).

Latent disability generally refers to an injury or disability of insidious onset, such as occupational disease or condition produced by systemic infections, continued or repeated stress or strain, exposure to toxic chemicals, fumes, or poisons, or other continued or repeated exposure to conditions of the work environment which produce a cumulative or increasingly deleterious effect upon the employee, of which the employee may not be immediately aware. Paul S. Devlin, 39 ECAB 715 (1988).

The Board found that the evidence did not establish any continuing disability due to appellant's accepted back injury. Appellant was working without specific work restrictions and was therefore no longer disabled within the meaning of the Act as she worked at a wage equal to or greater than that which she received before her employment injury. While appellant was no longer disabled, appellant had residual impairment that entitled her to continuing medical benefits including physical therapy. Marlene G. Owens, 39 ECAB 1320 (1988).

The Board found that the medical evidence of record established that appellant sustained a temporary aggravation of his hypertension and he was entitled to compensation benefits for the period of time during which his blood pressure was abnormally high due to his federal employment and which rendered him disabled for work. Elmer R. Poland, 39 ECAB 1367 (1988).

Appellant sustained injury to his shoulder and returned to work under work restrictions outlined by his physician. Appellant was terminated from employment due to menacing behavior toward a supervisor and unofficial use of government property. There was no evidence that appellant was terminated from his employment due to his physical inability to perform his assigned duties and his work would still be available if his attitude toward his fellow employees had been acceptable. The Board found that appellant did not have any disability for work within the meaning of the Act. John W. Normand, 39 ECAB 1378 (1988).

Appellant did not stop work or seek immediate medical attention following the September 25, 1982 employment injury. He continued to work until November 6, 1982. Appellant testified before an Office hearing representative that he stopped work because his job ended because of weather conditions and not because of his back condition. The first medical evidence relating appellant's disability to his employment was dated November 14, 1983. The Board found that there was no medical evidence indicating that appellant had any disability for the period November 6, 1982 through November 13, 1983 due to his employment injury and therefore he was not entitled to compensation for wage loss for that period. George A. Mercurio, 39 ECAB 1447 (1988).

EMOTIONAL CONDITIONS

In general

Where an employee experiences emotional stress in carrying out his employment duties, or has fear and anxiety regarding his ability to carry out his duties, and the medical evidence establishes that the disability resulted from his emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. Where the disability results from the employee's emotional reaction to his or her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act. On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or the employee's frustration from not being permitted to work in a particular environment or to hold a particular position. Herman W. Thornton, 39 ECAB 875 (1988); Carla E. Phillips, 39 ECAB 1040 (1988); Leonard Dureseau, Jr., 39 ECAB 1062 (1988); Joseph C. DeDonato, 39 ECAB 1260 (1988); Robert Gray, 39 ECAB 1239 (1988); Gurchuran Dehal, 39 ECAB 1398 (1988).

Where the employee has alleged that the employment situation which caused his emotional reaction included actions taken by his supervisors which the employee described as constituting harassment, the issue is not whether in fact there was harassment or discrimination, but whether the disabling emotional reaction was precipitated or aggravated by the conditions of the employment. Leonard Dureseau, Jr., 39 ECAB 1062 (1988).

Emotional conditions resulting from actions taken by the employing agency in personnel matters, such as use of leave or benefits, have no relationship to the employee's assigned duties or to requirements imposed upon the employee by his or her work duties. Joseph C. DeDonato, 39 ECAB 1260 (1988).

Performance of duty

Appellant claimed that her emotional condition was due to her detail assignment in Chicago and to the efforts of her supervisor to place her on other detail assignments to Chicago. Appellant stated that she and her coworkers did not want to take the Chicago assignment because of the threat of violence or vandalism to the property of a food inspector if he or she did not grade processed food in accordance with the desire of plant managers. The Board noted that the detail assignment to Chicago constituted a specially assigned work duty under *Lillian Cutler*, 28 ECAB 125 (1976), and noted that disability arising out of an emotional reaction to a detail assignment or the working conditions involved in a detail assignment would be within the coverage of the Act. The case was remanded to the Office for further development. Brenda Getz, 39 ECAB 245 (1987).

Appellant alleged he sustained severe stress after being charged with sexual harassment at a meeting with his supervisor. The Board found that appellant's emotional condition did not constitute an injury sustained in the performance of duty. The sexual harassment complaints made against appellant did not arise out of appellant's day-to-day regular duties or out of any specially assigned duties imposed by the employment. Rather, the complaints arose out of appellant's own behavior toward certain female coemployees. Wilbert Kimbrough, 39 ECAB 425 (1988).

Appellant attributed his emotional condition to allegations made by the employing establishment that appellant had filed false vouchers for living expenses while on temporary duty in New York. The Board found that appellant's emotional condition was sustained in the performance of duty as his job required him to temporarily relocate from California to New York and to submit his expenses to the employing establishment. The procedure for claiming reimbursable travel expenses was a requirement imposed by appellant's employment and which gave rise to his emotional condition. No disciplinary action was ever taken against appellant for filing allegedly false travel vouchers, thus there was no wrongful conduct which would remove appellant's claim from occurring in the performance of duty. Thomas Lindsey, 39 ECAB 562 (1988).

The Board remanded the case for further development on the issue of whether appellant's emotional condition was causally related to factors of his federal employment. Appellant presented evidence which implicated factors of his employment as the cause of his emotional condition and presented medical evidence which lent support to his claim. The case was returned to the Office to prepare a statement of accepted facts which distinquished between the incidents and conditions of appellant's employment which constituted factors of employment within the coverage of the Act and those which did not, and to refer appellant to a Board-certified psychiatrist for an opinion on the causal relationship of appellant's emotional condition to the factors of his employment. Herman W. Thornton, 39 ECAB 875 (1988).

Claimant, a mail clerk working in Oklahoma City, Oklahoma, alleged an emotional condition which she attributed to learning of her husband's death. Her husband, also a postal employee, was shot and killed while working in Edmond, Oklahoma. The Board found that the Office properly rejected appellant's claim for compensation finding that the emotional trauma sustained was not related to appellant's day-to-day duties, specially assigned duties, or to any other requirement imposed by her employment. Carla E. Phillips, 39 ECAB 1040 (1988).

Appellant alleged an emotional condition which he attributed to low wages, his supervisor questioning him about use of sick leave, criticism from his supervisor regarding a project at work, not receiving proper recognition for work performed, and to other factors. The Board found that appellant's emotional condition resulted from the incidents as alleged by appellant and reversed a finding by the Office that appellant's emotional condition was not employment related. Leonard Dureseau, Jr., 39 ECAB 1062 (1988).

Claimant did not report for duty and subsequently experienced a panic attack upon his receipt of an employing establishment advisory letter noting that he was absent without leave and that his continued failure to comply with applicable regulations for requesting leave could result in employment termination. The Board found that appellant's panic attack and alleged emotional disability did not constitute an injury sustained in the performance of duty. Appellant's emotional condition was related to agency actions on personnel matters and had no relationship to his assigned duties or requirements imposed by his employment. Joseph C. DeDonato, 39 ECAB 1260 (1988).

Appellant alleged an emotional condition which he attributed to discrimination in his employment as he sought time off work for religious purposes. The Board found that appellant's emotional condition was due to symptoms caused by his distress over not being able to fulfill his religious responsibilities and obligations, which are not factors of employment. Robert Gray, 39 ECAB 1239 (1988).

Appellant conceded at the Office hearing that his physicial disability had ceased by the time the Office terminated compensation benefits; however, he alleged that an emotional condition continued after the effective date that the Office terminated his compensation. The Office had initially accepted that the employment injury caused a conversion reaction but this was later amended to an acute anxiety reaction with hyperventilation. The report of an Office referral psychiatrist noted that appellant's desire not to return to the same employing establishment location where the employment injury occurred was due to severe personality conflicts and not because of any psychiatric disability. The Board noted that as the medical evidence did not reveal any ongoing psychiatric disability, appellant had no compensable disability subsequent to the date his compensation benefits were terminated. Gurcharan Dehal, 39 ECAB 1398 (1988).

TERMINATION OF COMPENSATION

Claimant alleged an emotional condition as a result of his federal employment as a principal/teacher in Stebbins, Alaska with the Bureau of Indian Affairs. His claim was accepted by the Office for a temporary situational anxiety neurosis. The Office subsequently ordered that appellant's compensation award be rescinded, finding that his emotional condition was not caused by "factors of the actual employment activity" but rather by appellant's "interpersonal relationships with members of the [native] community." The Office determined that the entire amount of appellant's compensation was an overpayment. The Board reversed the findings of the Office and noted that the decision failed to address specific employment factors alleged by appellant which indicated that his responsibilities in Stebbins required interaction with members of the community outside the classroom. The rescission of appellant's disability compensation benefits was not justified as the Office failed to furnish a complete description of appellant's duties as a principal/teacher or show how his disability was not the result of his assigned responsibilities. Robert C. Fay, 39 ECAB 163 (1987).

EMPLOYEES

Section 8101(1) of the FECA defines the term "employee" for purposes of determining entitlement to compensation benefits under the Act. However, there are cases where it is necessary to go beyond the statutory definition and make a determination whether a particular worker comes within the Act's coverage by resorting to the facts and circumstances of the particular employment and applying principles respecting the existence of an employer-employee relationship. Kenneth W. Grant, 39 ECAB 208 (1987).

Appellant was employed under a contract for personal services entered between the employing establishment and Professional Temporary Services. The Board found that appellant was not an employee of the United States under section 8101(1) of the Act because the record did not establish a contract of hire between appellant and the employing establishment. Rather, Professional Temporary Services hired appellant and provided the employing establishment with his services under contract. The contract provided that appellant would be an employee of Professional Temporary Services which would pay appellant's salary and maintain workers' compensation coverage for its own employees. Kenneth W. Grant, 39 ECAB 208 (1987).

Whether a claimant is considered a federal employee for purposes of the Act depends on the particular facts and circumstances surrounding his or her employment. Among the factors to be considered are whether the claimant, although not paid, has been rendering service similar to the service of a civil employee and whether the employing agency was authorized by statute to accept such service. Larry Knoke, 39 ECAB 353 (1988).

Appellant sustained injury to his left hand while undergoing preemployment testing at the employing establishment. The Board found that appellant was not an employee of the United States within the meaning of section 8101(1) of the Act. At the time of injury, appellant did not receive any pay from the employing establishment, he was providing no identifiable service or benefit to the potential employer while taking the test, and he had received no guarantee of employment upon successful completion of the test session. The claimant was taking the preemployment test for his own benefit in order to qualify for employment among a pool of participants. Larry Knoke, 39 ECAB 353 (1988).

FORFEITURE OF COMPENSATION (SECTION 8106(B))

In a prior appeal the Board had found that appellant forfeited his right to compensation benefits because he failed to report, when requested, earnings from self-employment. The Board in the instant appeal found that an overpayment of compensation was created which occurred as a result of appellant's forfeiture of his right to compensation. The record established that appellant was engaged in work activity for the period September 7, 1976 to July 14, 1982 and was not totally disabled. Appellant had received earnings from self-employment which he was required to report to the Office during the periods covered by various CA-1032 report forms. Jesse L. Green, 39 ECAB 174 (1987).

Section 8106(b) of the FECA provides that the Office may require a partially disabled employee to report his earnings from employment or self employment, by affidavit or otherwise, in the manner and at such times as the Office specifies. An employee who (1) fails to make an affidavit or report when required; or (2) knowingly omits or understates any part of his earnings; forfeits his right to compensation with respect to any period for which the affidavit or report was required. Compensation forfeited under this section, if already paid, shall be recovered by a deduction from the compensation payable to the employee or otherwise recovered under section 8129, unless recovery is waived under that section. Robert L. Smith, 39 ECAB 202 (1987); William G. Austin, 39 ECAB 357 (1988); Roger Seay, 39 ECAB 441 (1988); Catherine Adams, 39 ECAB 829 (1988); Edward O. Hamilton, 39 ECAB 1131 (1988); Harry S. Renkert, 39 ECAB 1142 (1988).

The Board noted that the Office had informed appellant of his obligation to report his employment as periodically requested on Office form CA-1032. Appellant completed forms submitted by the Office indicating that he had no employment when, in fact, appellant was working part-time as a cashier at a self-serve gas station. The Board found that the Office properly determined that appellant had knowingly failed to report earnings from employment and that his failure resulted in forfeiture of his right of compensation. Robert L. Smith, 39 ECAB 202 (1987).

The Board found that appellant was subject to the forfeiture provisions of the Act because he failed to report earnings to the Office as required. The evidence revealed that appellant was self-employed in running a video arcade business and performed activities in the operation of the business which demonstrated that he was physically able to perform remunerative work and was no longer totally disabled. Although appellant contended that the video arcade business did not produce a net profit, this reason has not been accepted by the Board as a reasonable justification for the failure to report employment or earnings to the Office as required. William G. Austin, 39 ECAB 357 (1988).

Appellant, a laborer, completed an Office form CA-1032 indicating that he had no earnings or employment during the prior 12 month period covered by the form. The record established, however, that appellant had been employed as a truck driver and had earnings which he failed to report to the Office. Appellant alleged that he had notified the Office as to his employment as a truck driver on a form CA-8 (Claim for Continuing Compensation) submitted to the employing establishment; however, the Board noted that there was no record of the CA-8 form and that even assuming the form was of record, the forfeiture provision still applied. Roger Seay, 39 ECAB 441 (1988).

The Board found that the Office properly applied the forfeiture provisions of the Act to appellant as she failed to list work for 13 different employers for the period May 10, 1977 to May 9, 1980. Appellant completed Office form CA-1032 and left blank the space provided for reporting employment. As the evidence did not show that appellant had worked after August 16, 1980, the Board found that the Office improperly determined appellant forfeited her compensation for periods after that date. Catherine Adams, 39 ECAB 829 (1988).

Appellant forfeited his right to compensation benefits because he knowingly omitted or understated his earnings from self-employment as a photographer on CA-8 claim forms he submitted to the Office. The CA-8 claim forms submitted by appellant were completed as "N/A" (not applicable) to the form request for information on work for the period for which compensation benefits were claimed. The Board found, however, that appellant did not forfeit his right to compensation for the period prior to that covered by the form CA-8 as appellant did not receive any notification of his responsibility to report his employment activities or earnings to the Office until he completed the first CA-8 claim form. The case was affirmed as modified and remanded to the Office to recalculate the amount of overpayment for the period of forfeiture. Edward O. Hamilton, 39 ECAB 1131 (1988).

The Board found that appellant forfeited his right to compensation benefits because he failed to report the money he earned as a fishing guide. The Office had advised appellant that if he returned to his former job or obtained other employment he was to report his return to work immediately. Appellant contended that he was under the impression he did not have to report on earnings which were not as much as he was paid when working at the employing establishment. The Board noted that there is no threshold level below which appellant did not have to report his earnings from self-employment. Appellant did not report any earnings from self-employment on the CA-1032 forms he returned to the Office. Harry S. Renkert, 39 ECAB 1142 (1988).

HEARING LOSS

ADDITIONAL OR INCREASED LOSS

The Board found that appellant's claim for an additional schedule award for hearing loss was properly rejected under Chapter 2-801 of the Office's Federal Procedure Manual. Where less than one year has elapsed since the beginning date of a schedule award and the exposure to noise has not terminated, no additional schedule award will be paid. Appellant must file a new claim for an additional schedule award, with supporting exposure history, for the period subsequent to the time frame involved. Jimmy B. Newell, 39 ECAB 181 (1987).

Where exposure to noise at work causes an adverse effect on an employee's hearing, every such exposure constitutes a new injury. If an employee continues to be exposed to noise at work subsequent to the filing of a hearing loss claim and believes additional exposure has caused an increase in hearing loss, he or she must file another claim for the additional injury in order to secure benefits for the increased loss. Henry Ross, Jr., 39 ECAB 373 (1988).

The case was not in posture for decision on whether appellant had sustained an increase in hearing loss due to noise exposure in his federal employment. While the Office was correct in treating appellant's claim for an additional hearing loss as a new claim, the prior claim and supporting evidence upon which a schedule award was granted was relevant in determining whether appellant had sustained any additional hearing loss. The Office was instructed to combine appellant's present case file with his prior hearing loss claim file. The Board further noted that the Office medical adviser did not provide any explanation as to why he chose to review one audiogram over other audiometric test results of record. Henry Ross, Jr., 39 ECAB 373 (1988).

Appellant filed a claim alleging he had sustained an additional hearing loss due to occupational noise exposure over the 18 percent binaural hearing loss for which he had received a schedule award. The Board found that the medical evidence established that appellant had no more than an 18 percent binaural hearing loss for which he had received a schedule award. Henry Moreno, 39 ECAB 475 (1988).

Appellant, an industrial engineer, was granted a schedule award for a 52 percent binaural loss of hearing. He was not exposed to occupational noise after 1974; however, he alleged that his hearing continued to deteriorate due to the use of hearing aids necessitated by his employment-related hearing loss. The Board found the case was not in posture for decision as the Office had referred the case to an Office medical consultant to resolve a conflict in medical opinion. The case was remanded to the Office to refer appellant for an impartial medical examination by an otolaryngologist. Irwin J. Schumacher, 39 ECAB 798 (1988).

AMA STANDARD (SEE ALSO SCHEDULE AWARDS)

On February 24, 1986 the Office adopted a new standard for determining the extent of permanent impairment in hearing loss cases. This standard is based on the formula contained in the second edition to the A.M.A. Guides published in 1984. As noted by Office Program Memorandum No. 272: "The A.M.A.'s formula calculates the hearing loss for one ear (monaural) by testing for hearing loss at the 500, 1,000, 2,000, and 3,000 frequency levels. The losses at each frequency are added up and averaged and, using ANSI-ISO standards, the 'fence' of 25 decibels is deducted from the average loss. The result is multiplied by 1.5 to arrive at monaural hearing loss. To determine the loss for both ears (binaural), the loss in each ear is calculated using the formula for monaural loss. The lesser loss is multiplied by 5, then added to the greater loss. The total is divided by 6 to arrive at the binaural loss." This standard was made applicable to all hearing loss evaluations made on or after February 24, 1986. Benjamin Swain, 39 ECAB 448 (1988); Joseph J. Tillo, 39 ECAB 1345 (1988).

The Board found that appellant had no more than a 43 percent binaural hearing loss for which he received a schedule award. An Office medical adviser properly applied the Office's standards to the results of audiometric testing obtained by the Office referral physician. Benjamin Swain, 39 ECAB 448 (1988).

The Office, in FECA Program Memorandum No. 181, provided that on occasion, the allowances for loss of hearing in each ear, if computed separately, may be greater than the combined value of bilateral hearing loss. In such cases the employee should be given the benefit of the more favorable allowance and compensated for the sum of the loss of hearing of each ear. Joseph J. Tillo, 39 ECAB 1345 (1988).

Calculated separately, appellant's total hearing loss using monaural figures, would result in 17.55 weeks of compensation as opposed to the 16 weeks of compensation the Office awarded appellant for an eight percent binaural hearing loss. The case was remanded to the Office for a redetermination of appellant's schedule award. Joseph J. Tillo, 39 ECAB 1345 (1988).

NOISE EXPOSURE DATA

In hearing loss claims, noise exposure data on the claimant's working environment are generally furnished by the employing establishment. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government sources. In the present case, the employing establishment submitted noise exposure data together with a description of appellant's responsibilities but the information submitted contained inconsistent statements as to when appellant's exposure to hazardous noise ceased. Since the employing establishment provided the inconsistent information, the Office should have requested clairification of these inconsistencies from the employing establishment. Henry Ross, Jr., 39 ECAB 373 (1988).

TINNITUS

There is no basis for paying a schedule award for a condition such as tinnitus unless the medical evidence establishes that the condition caused or contributed to a ratable permanent hearing loss. Charles H. Potter, 39 ECAB 645 (1988).

HEART CONDITIONS

EVIDENCE REQUIRED

The Board found that appellant failed to meet his burden of proof in establishing that his disability due to a heart condition was causally related to factors of his federal employment. Appellant attributed his heart condition to the pressures of his job as a letter carrier. None of the medical evidence submitted by appellant contained a discussion of the causal relationship between any employment factor cited by appellant and his disabling heart condition. Richard F. Hines, 39 ECAB 1431 (1988).

REMAND FOR DEVELOPMENT

The Board found that the case was not in posture for decision on the issue of whether appellant's myocardial infarction was causally related to factors of appellant's federal employment. The Board noted that the physician selected as the impartial medical specialist did not conduct the examination of appellant. Instead, an associate performed the examination of appellant and submitted a report to the Office. For this reason the medical report could not be used to resolve the conflict in medical opinion as it was obtained from a physician who was not selected as an impartial medical specialist in conformance with the Office's procedures. William C. Iadipaolo, 39 ECAB 530 (1988).

IDIOPATHIC FALLS

Where a personal, nonoccupational pathology causes an employee to collapse and to suffer injury upon striking the immediate supporting surface and there is no intervention or contribution by any hazard or special condition of the employment, the injury is not a personal injury while in the performance of duty within the contemplation of the Act as it does not arise out of a risk connected with the employment. Although a fall is idiopathic in nature, an injury resulting from it is compensable if some employment circumstance or working condition intervenes in contributing to the incident or injury, such as where an employee, instead of falling directly to the floor, strikes a part of his or her body against a wall, piece of equipment, furniture, machinery or some similar object. The employee has the burden of establishing that he or she struck an object connected with the employment during the course of the idiopathic fall. Robert J. Choate, 39 ECAB 103 (1988).

Appellant filed a claim stating that he was working at three teletype terminals and the next thing he knew he woke up on the floor. A witness to the fall indicated that he heard a noise and saw appellant lying on the floor. As no witness actually saw appellant fall to the floor or whether he struck any equipment while experiencing what was diagnosed as a seizure, appellant's injury was not sustained in the performance of duty. Robert J. Choate, 39 ECAB 103 (1988).

INJURY

Consequential injury

Where there is no direct relationship between an employment-related injury and a subsequent nonemployment injury, the second injury is an independent, intervening incident and is not compensable; on the other hand, where the second injury is sustained as a consequence of an impairment residual of the employment injury, the second injury is deemed, because of the claim of causation, to arise out of and to be in the course of employment and is compensable. Jessie Johnson, Jr., 39 ECAB 945 (1988).

Appellant sustained an employment-related injury to his right knee accepted as a torn anterior cruciate ligament and torn posterior horn of the medial meniscus. Appellant claimed that his progressive myopathy, diagnosed as limb girdle dystrophy was related to the employment injury. The Board found that appellant's progressive myopathic condition was a separate independent condition unrelated to the accepted employment injury. While the condition aggravated appellant's right knee condition, such aggravation was not shown to be employment related and was not compensable. Jessie Johnson, Jr., 39 ECAB 945 (1988).

When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributed to the claimant's own intentional conduct. Karen C. Schaffer, 39 ECAB 1219 (1988); Ernest Tesoriero, 39 ECAB 1461 (1988).

Appellant sustained a contusion to her left knee in 1986 when she struck it against her desk. In 1987 appellant fell while walking on a public sidewalk and attributed the incident to her accepted employment injury. The Board found that appellant failed to establish that the injury in 1987 was the direct and natural result of her 1986 employment injury to her knee. Karen C. Schaffer, 39 ECAB 1219 (1988).

The Office accepted appellant's claim for a lumbar strain with radiculopathy resulting in a herniated nucleus pulposus at L5-Sl. While appellant was hospitalized for treatment of his employment-related back condition he sustained a myocardial infarction. The Board found that the Office did not fully investigate the circumstances surrounding the onset of appellant's myocardial infarction and remanded the case for further development on whether the myocardial infarction was a consequential injury. Ernest Tesoriero, 39 ECAB 1461 (1988).

FACT OF INJURY, EVIDENCE

An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, as alleged, but the employee's statements must be consistent with surrounding facts and circumstances and his or her subsequent course of action. Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment may cast doubt on an employee's statements in determining whether he or she has established a *prima facie* case. Merton J. Sills, 39 ECAB 572 (1988).

The Board found that the evidence failed to establish that appellant sustained an injury as alleged. Appellant did not stop work after the alleged injury or was there evidence of immediate medical treatment following the incident to which appellant attributed his back condition. Since appellant failed to establish the original injury, as alleged, he could not establish a recurrence of injury. Merton J. Sills, 39 ECAB 572 (1988).

OCCUPATIONAL DISEASE OR ILLNESS

The Office's regulations define occupational disease or illness as a condition produced in the work environment over a period of time longer than a single work day or shift by such factors as systemic infection; continued or repeated stress or strain; or exposure to hazardous elements such as, but not limited to, toxins, poisons, fumes, noise, particulates, or radiation, or other continued or repeated conditions or factors of the work environment. Debra A. Kirk, 39 ECAB 1257 (1988).

POSSIBILITY OF FUTURE INJURY

The possibility of a future injury does not consitute an injury under the Act and therefore no compensation can be paid for such a possibility. Gaeten F. Valenza, 39 ECAB 1349 (1988).

The medical evidence indicated that appellant would again have asthma attacks if he returned to an environment involving exposure to tobacco smoke. The proscription against returning to such an environment, however, was based on the effect the exposure might have on the underlying condition and did not constitute a basis for payment of compensation. Gaeten F. Valenza, 39 ECAB 1349 (1988).

The Board accepted appellant's claim for a temporary period of disability causally related the aggravation of his hypertension following a discussion with his supervisor. The condition was transient in nature and once it had resolved there was no basis for payment of future compensation. The fear of a recurrence of disability is not a basis for the payment of compensation. Elmer R. Poland, 39 ECAB 1367 (1988).

TRAUMATIC INJURY

A traumatic injury is defined under Office regulations as a wound or other condition of the body caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member of function of the body affected. The injury must be caused by a specific work event or incident or series of events or incidents within a single work day or work shift. Thomas J. Scola, 39 ECAB 1149 (1988); Debra A. Kirk, 39 ECAB 1257 (1988).

Appellant alleged that he sustained a traumatic injury, specifically chest pains and an emotional condition, following a disciplinary action meeting at the employing establishment at which he received a reprimand. The Board found that the evidence submitted by appellant did not establish that the conditions for which he sought compensation resulted from a specific event or series of events or incidents occurring within a single work day. Thomas J. Scola, 39 ECAB 1149 (1988).

LUMP SUM SETTLEMENT

A determination as to whether awarding a lump sum would be in an employee's best interest, considering the permanence of disability, cannot be undertaken until a final decision on appellant's eligibility for continuing compensation benefits has been rendered. Charles L. Zane, 39 ECAB 627 (1988).

The issue of whether appellant was entitled to a lump sum settlement of his claim was premature as the fact of appellant's continuing entitlement to compensation benefits had not been determined. No final decision on appellant's request for a lump sum could be made until the Office issued final decisions on whether appellant refused suitable work and whether appellant had a loss of wage-earning capacity. Charles L. Zane, 39 ECAB 627 (1988).

LEAVE BUY-BACK

An employee may decide to take sick and/or annual leave in order to avoid possible interruption of income. If such employee does so decide and his or her claim for compensation is subsequently approved, such employee may arrange with his or her employing establishment to "buy-back" the leave used and have it reinstated to such employee's account. The compensation to which the employee is entitled, may be used to pay a part of the "buy-back" cost and the employee shall be obligated to pay the balance. No compensation payments shall be paid, however, while the employee is still in leave status. Arrangements to "buy back" leave, shall be made with the employing agency. James R. Rowell, 39 ECAB 869 (1988).

MAILBOX RULE

A letter properly addressed is presumed to have arrived at the mailing address in due course. Jeff Micono, 39 ECAB 617 (1988).

MEDICAL EXAMINATION (SECTION 8123)

OBSTRUCTION OR REFUSAL TO UNDERGO

Section 8123 of the FECA authorizes the Office to require an employee who claims compensation for an employment-related injury to undergo such physical examination as it deems necessary. Subsection (d) provides that if an employee refuses to submit to or obstructs an examination, his or her right to compensation is suspended until the refusal or obstruction stops. Esther G. Lynch, 39 ECAB 193 (1987); Roger Wilcox, 39 ECAB 220 (1987); A.D. Hendrix, 39 ECAB 762 (1988).

The Board found that the Office improperly applied section 8123(d) when it issued a compensation order rejecting appellant's claim for compensation. Where an employee fails to keep a scheduled appointment with an Office referral physician, section 8123(d) provides that the employee's entitlement to compensation may be suspended if he or she refuses to undergo or obstructs the medical examination. The section does not provide that an employee's right to compensation benefits can be rejected on the ground that the employee refused to undergo or obstructed a medical examination. Esther G. Lynch, 39 ECAB 193 (1987).

The Board found that Office abused its discretion by not considering the reasonableness of appellant's explanation for failing to appear for a scheduled medical examination. The Board reversed the suspension of appellant's compensation benefits under section 8123(d). Roger Wilcox, 39 ECAB 220 (1987).

Appellant alleged a hearing loss sustained during his federal employment. He underwent three separate audiometric evaluations which yielded inconsistent test results. The Office found that appellant had obstructed his medical examinations based on medical opinion evidence that neither the machinery upon which appellant was tested nor the personnel administering his audiological tests were responsible for the inconsistent test results. The Board affirmed the Office's suspension of appellant's right to compensation, noting that appellant could end the suspension at any time by submitting evidence that the obstruction had ceased by submission of an audiological evaluation by an otolaryngologist which included a reliable audiogram. A.D. Hendrix, 39 ECAB 762 (1988).

MEDICAL EXPENSES AND TREATMENT

In general

Under section 8103 of the Act, the Office is required to provide all medical care necessary as a result of an employment injury. The Office has the general objective of ensuring that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time. The Act provides that appropriate medical care be furnished by or on the order of physicians designated or approved by the Office and that appellant be allowed the initial choice of physician. This does not restrict the Office's power to approve appropriate medical treatment obtained after the initial choice of physician and without prior authorization from the Office. The Office has broad discretionary authority in the administration of the Act and must exercise that discretion to achieve the objectives of section 8103. Marjorie S. Geer, 39 ECAB 1099 (1988).

Authorization

Where the initial selection of a physician is not involved, the Office, under section 8103(a) of the FECA, has discretion in furnishing medical treatment which it considers likely to cure, give relief or reduce the degree or period of an employee's disability. Under section 10.401(b) of the Office's regulations, the Office also has discretion in permitting changes in authorized physicians. Clara A. Morgan, 39 ECAB 305 (1987).

Appellant, an electroplater, sustained a wrist injury in the performance of duty. She sought authorization to change her treating physician contending that it was difficult to schedule an appointment with her doctor. The Board found that the fact appellant experienced delays in waiting for an appointment did not indicate that she was receiving less than proper medical treatment as she did not submit evidence to support she required more frequent examinations than those conducted. The Board noted, however, that at a hearing before an Office hearing representative appellant submitted evidence that her authorized physician had become ill and had closed his practice. This fact was confirmed by the Office, and the Board remanded the case for a determination by the Office on appellant's entitlement to reimbursement for expenses incurred for medical treatment rendered by her new physician. Clara A. Morgan, 39 ECAB 305 (1987).

Appellant, a letter carrier, sought reimbursement of medical expenses incurred at a hospital emergency room following an employment-related injury. The employing establishment noted that appellant's supervisor had told him to go to the hospital for treatment. The Board found that appellant was not entitled to reimbursement of his medical expenses on the ground that his examination and treatment at the hospital were not authorized by the employing establishment in accordance with Office regulations. The employing establishment did not submit a properly executed Form CA-16. Oral authorization by the employing establishment does not create a contractual obligation on the part of the Office to pay for or reimburse expenses incurred for medical treatment of an alleged employment-related injury. Steven R. Piper, 39 ECAB 312 (1987).

The Board, on reconsideration, noted that in *George Witte*, 38 ECAB -- (1987), that the Office has the discretion to determine whether to approve payment for medical treatment secured in the absence of a valid Office Form CA-16 authorization. The Board concluded that the facts of the instant case did not reveal an "emergency" or "unusual circumstances" as defined under the applicable Office regulations precluding the authorization of medical treatment by a properly completed Form CA-16. The Office was found not to have abused its discretion in refusing to reimburse appellant for the medical services in question. Jay Lowenthal, 39 ECAB 969 (1988).

The Board modified the holding of *Richard Bowen*, 33 ECAB 1015 (1982) to reflect that while appellant is not entitled to reimbursement of unauthorized medical care as a matter of right, the Office nevertheless has the discretionary authority to approve unauthorized medical care under the Act which it finds necessary and reasonable and the Office is required to exercise that discretion. Marjorie S. Geer, 39 ECAB 1099 (1988).

INITIAL CHOICE OF PHYSICIAN

Section 10.401(b) of the Office's regulations provide that an employee has only an initial choice of physicians. A change of physician will be permitted only upon approval of the Office after the employee submits an explanation of his or her desire to change. Elizabeth J. Davis-Wright, 39 ECAB 1232 (1988).

Following an employment injury on September 18, 1984, appellant was taken by her supervisor to a physician's office for medical treatment on September 24, 1984. Appellant thereafter returned to the physician, an internist, for treatment on September 25, 1984. On September 27, 1984 appellant commenced treatment by a chiropractor. The Board found that since appellant voluntarily chose to return to the internist, he constituted her initial choice of treating physician. The Board noted, however, that a conflict in medical opinion existed on whether x-rays obtained by the internist revealed a spinal subluxation and remanded the case for referral to a Board-certified radiologist. Elizabeth J. Davis-Wright, 39 ECAB 1232 (1988).

REIMBURSEMENT

Appellant sought reimbursement for expenses incurred consisting of diagnostic testing and treatment at a hospital. The Board noted that the record did not contain any prior written authorization from the Office for the medical treatments obtained by appellant. Nor was there evidence that the treatments were performed because of any existing emergency situation. Further, the Board noted that the medical evidence did not establish that the expenditures made were for treatment of the effects of an employment-related condition. For these reasons, the Office was not obligated to pay for the expenses incurred by appellant. Louis G. Psyras, 39 ECAB 264 (1987).

The Office properly terminated appellant's medical benefits on the ground that his urological condition was not employment related. The medical evidence established that appellant had no current objective findings of an employment-related urologic condition underlying his subjective complaints. For this reason, the medical expenses incurred by appellant for surgical treatment of his transurethal resection were not for an employment-related condition and the Office was under no obligation to pay for these medical expenses. Calvin S. Mays, 39 ECAB 993 (1988).

The Board found that the Office properly denied appellant reimbursement for the cost of unauthorized medical treatment by a chiropractor. A conflict in medical opinion as to whether or not x-rays obtained of appellant's spine demonstrated a spinal subluxation was resolved by a Board-certified radiologist who opined that appellant exhibited a minimal degree of scoliosis which was not clinically significant. The radiologist could find no evidence of a subluxation of the spine as defined in the *Medicare Carrier's Manual;* therefore, the Board found that the chiropractor was not a physician and his services could not be considered reimbursable medical treatment. Marjorie S. Geer, 39 ECAB 1099 (1988).

The case was not in posture for decision due to a conflict as to whether x-rays of appellant's spine obtained by an internist revealed a spinal subluxation. The case was remanded to the Office to refer the case record and x-rays to a Board-certified radiologist for an opinion in accordance with the *Medicare Carrier's Manual* definition. Elizabeth J. Davis-Wright, 39 ECAB 1232 (1988).

SERVICES, APPLIANCES AND SUPPLIES

Section 8103 of the FECA provides for the furnishing of services, appliances, and supplies prescribed or recommended by a qualified physician which the Office considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of monthly compensation. Lenard E. Fritz, 39 ECAB 170 (1987).

The Board found that the Office did not abuse its discretion by refusing to reimburse appellant for the cost of installation of a hot tub and whirlpool. There was no evidence that the appliances for which appellant sought reimbursement were recommended or prescribed by any physician before they were installed in appellant's home. Lenard E. Fritz, 39 ECAB 170 (1987).

MEDICAL OPINIONS

IMPARTIAL MEDICAL EXAMINATIONS

The Board found that the appeal was not in posture for a determination on whether appellant's eye condition was causally related to occupational exposure to radiation. A conflict in medical opinion between appellant's attending physician and an Office referral medical panel necessitated the referral of appellant for an impartial medical examination under section 8123(a) of the FECA. Enzio A. Muto, 39 ECAB 108 (1987).

Claimant, a laboratory technician, alleged he sustained an acquired auto-immune disorder which he attributed to handling animals as experimental subjects. The Board found a conflict in medical opinion on the issue of whether appellant's Vogt-Koyanaga-Harada disease and acquired auto-immune disorder were related to factors of his employment. The case was remanded to the Office for referral of appellant to an impartial medical specialist under section 8123(a) of the Act. Joseph Allen Miles, 39 ECAB 125 (1987).

Appellant alleged that his occupational exposure to chemicals and fumes caused or aggravated his asthmatic or allergic rhinitis condition. The Board found that the case was not in posture for decision due to a conflict in medical opinion between appellant's attending physician, who stated that appellant had severe allergic rhinitis which was aggravated by his exposure to chemical solutions at work, and the opinion of an Office referral physician who opined that appellant had developed asthma coincidentally with and independently of his work with chemicals and fumes. The case was remanded to the Office to refer appellant for examination under section 8123(a) of the Act. Mathew S. Dixon, 39 ECAB 397 (1988).

Appellant sustained a facial burn due to fumes from an oil pit at the employing establishment. He alleged that his exposure to dust and fumes also aggravated his chronic obstructive pulmonary disease. The Board found that the case was not in posture for decision due to an unresolved conflict in medical opinion on whether appellant's employment caused a permanent or temporary aggravation of his pulmonary condition. The case was remanded to the Office to refer appellant for an impartial medical examination pursuant to 5 U.S.C. section 8123(a). Leonard M. Thompson, 39 ECAB 487 (1988).

CLARIFICATION OF IMPARTIAL REPORT

In a situation where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report. Annabelle Shank, 39 ECAB 548 (1988); Ramon K. Farrin, Jr., 39 ECAB 736 (1988).

The Board found that the Office improperly referred appellant out for a second impartial medical examination without first requesting a supplemental clarifying report from the first designated impartial medical specialist. As the initial report of the first impartial specialist was favorable to appellant's claim, the Office's action was open to the suspicion that it was shopping around to secure a medical opinion favorable to its view of the case. For this reason, the Board did not give any weight on review to the report improperly obtained from the second impartial specialist. The Office was directed to prepare an augmented statement of accepted facts and request a supplemental report from the first impartial specialist. Annabelle Shank, 39 ECAB 548 (1988).

The Board found that the report obtained from the impartial medical specialist failed to resolve the conflict in medical opinion as to whether appellant's tendinitis of the upper extremities was causally related to factors of his federal employment. The responses provided by the specialist to the inquiries of the Office were not definitive, were vague, and were equivocal in nature. The Office should have requested the impartial specialist to clarify his opinion. The Board notes that the specialist recognized in his report his inability to clarify his opinion further; therefore, the Office should have referred appellant for a second impartial medical examination. The case was remanded for that purpose. Ramon K. Farrin, Jr., 39 ECAB 736 (1988).

The case was not in posture for decision on whether appellant's federal employment caused a temporary or permanent aggravation of his preexisting hypertension, peptic ulcers, or diabetes conditions. Based on a conflict in medical opinion appellant was referred to an impartial medical specialist; however, the Board found that the medical report obtained from the impartial specialist was not sufficiently well-rationalized and required clarification. The case was remanded to the Office to seek clarification of the impartial specialist's original report. Newton Ky Chung, 39 ECAB 919 (1988).

IMPROPERLY OBTAINED MEDICAL OPINIONS

Office Bulletin No. 86-14 provides that improperly obtained medical opinion evidence should be marked "excluded" and the pages of the report be stapled together. In a prior appeal the Board found that the opinion of a physician was improperly obtained and instructed the Office to annotate the report in order that it would not be considered by other physicians on review of the record. The Office failed to follows its established procedures, and the Board found that the additional medical reports obtained by the Office on remand were tainted because referral physicians had reviewed the improperly obtained report and had relied upon it in reaching conclusions on the issue involved in the case. The case was remanded to the Office to obtain a report from another impartial medical specialist not previously associated with the case to resolve whether appellant required medical treatment for residuals of his employment injury. Joseph R. Alsing, 39 ECAB 1012 (1988).

LEADING QUESTIONS

The Board found that the medical report obtained from an associate of the designated impartial medical specialist could not be used to resolve the conflict in medical opinion. The Board noted that the Office had sought clarification of the associate physician's medical opinion through inquiries which were characterized as leading questions. Vernon E. Gaskins, 39 ECAB 746 (1988).

In a prior appeal, the Board found an unresolved conflict in medical opinion because the Office had designated a physician who performed fitness-for-duty examinations for the employing establishment as the impartial medical specialist. The case was remanded to the Office to refer appellant for a new impartial medical examination. Appellant was referred to a new impartial specialist, however, the Board found in the instant appeal that the statement of accepted facts prepared by the Office was inadequate, as there were no pertinent facts included upon which he could base his opinion. The initial report provided by the specialist briefly described his physical examination of appellant and x-ray findings, and noted only a tentative diagnosis pending further diagnostic testing. There was no review of the medical reports which gave rise to the conflict in medical opinion. A supplemental report was provided by the physician in response to questions of the Office which the Board found to be leading questions. This supplemental report was found to be incomplete on its face because it provided no response to the questions posed by the Office and was not dispositive on the issue of appellant's continuing disability. The Board reversed the Office's decision which terminated appellant's medical benefits. James T. Johnson, 39 ECAB 1252 (1988).

Medical examination

The term "examination" as found in section 8123(a) refers to an actual physical examination of the employee, and not just to an evaluation of the case record by the third party physician selected as the impartial medical referee to resolve the conflict in medical opinion. Under Board case law this medical referee is referred to as an impartial medical specialist. Andrew Losh, 39 ECAB 1070 (1988).

A conflict in medical opinion existed as to whether appellant's left superficial femoral artery occlusion, which was surgically treated by implacement of a bypass graft, was causally related to an accepted employment-related myocardial infarction. The Board found that the resolution of the conflict did not require the physical referral of appellant to the referee specialist as a physicial examination of appellant, almost one year after the surgical treatment of his condition, would add nothing to the completeness or the accuracy of the impartial specialist's report. Willie C. Christian, 39 ECAB 1114 (1988).

Review by Office medical personnel

Appellant, a letter carrier, twisted his right knee after being startled by a dog. The Board found that the appeal was not in posture with regard to the extent of impairment of appellant's right leg. The Office erred in not following its established procedures for review of medical reports obtained from impartial medical specialists. The Office referred the medical report obtained from the impartial medical referee back to the Office medical adviser whose opinion had created the conflict in medical opinion. FECA Bulletin No. 85-39 sets forth a procedure whereby an Office medical adviser involved in the creation of a conflict in medical opinion may not review the report of the impartial medical examination obtained under section 8123. The Board noted that the medical evidence obtained by the Office following the medical adviser's review of the impartial specialist's report was not compiled pursuant with established Office procedures and therefore would not be given any weight on review. Daniel J. Boyle, 39 ECAB 254 (1987).

The Office had referred the case record to an Office medical consultant in otolaryngology to resolve a conflict in medical opinion as to whether the deterioration in appellant's hearing was due to the use of hearing aids necessitated by an employment-related hearing loss. The Board found that the Office medical consultant could not serve as an impartial medical specialist and remanded the case to the Office to refer appellant for examination by an impartial otolaryngologist. Irwin J. Schumacher, 39 ECAB 798 (1988).

Where the Office secures an opinion from an impartial medical specialist to resolve a conflict in medical opinion, it is improper for the Office to send appellant to another medical specialist merely because an Office medical adviser disagrees with the conclusion reached by the impartial medical specialist. Such action is open to the suspicion that the Office shopped around for the purpose of securing a medical opinion favorable to its view of the case. Andrew Losh, 39 ECAB 1070 (1988).

SELECTION OF IMPARTIAL SPECIALIST

The Board found an unresolved conflict in medical opinion necessitated the referral of appellant to a new impartial medical specialist. The Board found that the third impartial medical specialist selected by the Office could not serve in that capacity because he was an associate in medical practice with a physician who had previously served as the second impartial specialist. Daniel A. Davis, 39 ECAB 151 (1987).

A physician selected by the Office to serve as an impartial medical specialist under section 8123(a) of the Act should be one wholly free to make a completely independent evaluation and judgment. The Office has developed specific procedures for the selection of impartial medical specialists designed to provide adequate safeguards against any possible appearance that the selected physician's opinion was biased or prejudiced. Daniel A. Davis, 39 ECAB 151 (1987); Vernon E. Gaskins, 39 ECAB 746 (1988); David Peisner, 39 ECAB 1167 (1988).

The Board, citing *Raymond E. Heathcock*, 32 ECAB 2004 (1981) noted that it has disqualified physicians from serving in the capacity of an impartial medical specialist when the record demonstrates that such specialist is in association or otherwise affiliated with a physician whose medical opinion was used to create a conflict in medical opinion. The Board rejected the contention raised by the Director of the Office that the third impartial specialist's opinion should constitute the weight of medical opinion, and that the *Heathcock* precedent was not applicable to the facts of this case. The Director noted that the opinion secured from the second impartial specialist did not create or give rise to the conflict in medical opinion, but had been secured in an unsuccessful attempt to resolve the conflict already existing in the record. The Board found that the Office must assure that the physician designated as the impartial medical specialist has no prior association or affiliation with any other physician of record who has examined the claimant or provided an opinion on the claim. Daniel A. Davis, 39 ECAB 151 (1987).

The Office had incorrectly referred appellant for an impartial medical examination based upon a difference in medical opinion between two of appellant's treating physicians. The Board found that there existed a conflict in medical opinion between appellant's personal physician and an Office referral physician. The case was remanded to the Office for further development of the medical evidence. Adina D. Blanco, 39 ECAB 510 (1988).

The Board found that the case was not in posture for decision on whether appellant's myocardial infarction was causally related to factors of his federal employment. A conflict in medical opinion necessitated the referral of appellant for a new impartial medical examination. The designated impartial medical specialist did not perform the evaluation of appellant or submit a report to the Office; instead, an associate of the physician conducted the evaluation and submitted a report. The Board found that the report obtained could not be used to resolve the conflict in medical opinion because it was not obtained in conformance with Office procedures on securing medical reports from impartial medical specialists. William C. Iadipaolo, 39 ECAB 530 (1988).

The Office Federal (FECA) Procedure Manual provides that a medical referee examination is required in cases where there is a conflict of medical opinion. The Office will follow a rotation system in selecting the impartial medical specialist from a list of all available and qualified Board-certified specialists as far as practicable to eliminate any possible inference of bias or partiality. Physicians in full-time employment with federal agencies and physicians previously connected with the claim will not be used as medical referees. On rare occasions a noncertified specialist may be used because of his or her unusual qualifications in a particular field. Upon specific request of the employee or the employee's attorney, the Office will prepare a list of three or more certified specialists for submission to the employee or the employee's attorney, permitting the employee to participate in the selection process. Vernon E. Gaskins, 39 ECAB 746 (1988).

The Board found that the case was not in posture for decision. The Office had referred appellant to a physician to act as the impartial medical referee; however, the designated physician did not perform the examination or submit a report to the Office. The examination was conducted by an associate of the designated impartial referee and the associate submitted a report to the Office. The Board noted that the medical report obtained from the associate would not be given any weight on review as the physician had not been selected as the impartial medical referee. Vernon E. Gaskins, 39 ECAB 746 (1988).

The Office improperly found a conflict in medical opinion on the issue of whether appellant had any employment-related disability as a result of his carpal tunnel syndrome. A disagreement in medical opinion arose between a physician who examined appellant at the request of appellant's attending family practitioner and a second physician who appellant had consulted on his own. The Board found that a conflict in medical opinion under section 8128(a) of the Act could not be declared between appellant's physicians. For this reason, the Office had improperly designated it's referral physician as an impartial medical specialist and his report could not be considered as the weight of medical opinion. The Board found that the Office referral physician's report created a conflict in medical opinion and remanded the case to the Office for referral to a referee physician. Pierre W. Peterson, 39 ECAB 955 (1988).

Appellant was referred by the Office to an impartial medical specialist for examination and an opinion on whether appellant's arteriosclerotic heart disease was related to factors of his employment. He was examined by a resident or intern and a medical report was prepared by a specialist in cardiology other than the designated impartial medical specialist. As this physician's report was obtained in a manner not conforming with the Office's procedures on the selection of impartial referee examinations, it could not be used to resolve the conflict in medical opinion and would not be given any consideration on review by the Board as it was improperly obtained. The case was remanded to the Office for further development of the medical evidence. Andrew Losh, 39 ECAB 1070 (1988).

The impartial specialist designated by the Office was not appointed in accordance with the procedures established by the Office for the selection of impartial medical referee physicians. The designated specialist in this case was selected on the basis of a recommendation of an Office medical adviser and not on the rotating basis as provided in the Office's Procedure Manual. The case was remanded to the Office to prepare a new statement of accepted facts and refer appellant for an impartial medical examination in accordance with the Office's procedures. David Peisner, 39 ECAB 1167 (1988).

The statement of an Office medical adviser recommending that an appellant be referred to specialists in order to determine the status of her employment-related disability was not sufficient to create a conflict in medical opinion. Therefore the physician whom the Office referred to as an impartial medical specalist was only an Office medical referral physician. Velta H. Mikelsons, 39 ECAB 1278 (1988).

STATEMENT OF ACCEPTED FACTS

The Board found that the appeal was not in posture for a determination on whether appellant's eye condition was causally related to alleged occupational exposure to radiation. A conflict in medical opinion was created between appellant's attending physicians and an Office medical adviser. The case was referred to an impartial medical specialist under section 8123(a); however, the statement of accepted facts prepared by the Office was incomplete with regard to appellant's exposure to nonionizing radiation. The Office subsequently determined that the impartial specialists report was insufficient to resolve the conflict because of the inadequate occupational exposure data he relied upon in formulating his medical opinion. The Office thereafter referred the case record for review by a "Radiation Expert Medical Panel." Based on the Panel's report, the Office found that appellant's eye condition was not causally related to factors of his federal employment. On appeal, the Board noted that the Office erred in selecting the medical panel because the Office failed to follow its established procedures for the selection of a second impartial medical opinion on the disputed issue. The Board also noted that the selection of the medical panel was open to the suspicion that the Office shopped around for the purpose of securing a medical opinion favorable to its view. The Board found that there remained an unresolved conflict in medical opinion which necessitated the referral of appellant to another impartial medical specialist. Warner E. Armbruster, 39 ECAB 131 (1987).

The Director of the Office conceded at oral argument before the Board that the statement of accepted facts submitted to the impartial medical specialist did not indicate those factors implicated by appellant as contributing to his heart condition that would be deemed employment factors and those factors that would not. The Board noted that where working conditions are alleged as a factor in causing disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed factors of employment and which factors may not be considered prior to submitting the case record to the medical expert for an opinion on causal relationship. David Peisner, 39 ECAB 1167 (1988).

WEIGHT OF IMPARTIAL REPORT

When a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical opinion evidence, the opinion of such specialist, if sufficiently well-rationalized and based on a proper medical background, must be given special weight. Louis G. Psyras, 39 ECAB 264 (1987); Harold Weisman, 39 ECAB 961 (1988); Marlene G. Owens, 39 ECAB 1320 (1988).

The Board found that appellant did not have any disabling residuals causally related to his employment-related back injuries. A conflict in medical opinion necessitated the referral of appellant to an impartial medical specialist whose opinion, based upon a thorough review of the record and a comprehensive examination of appellant, was found to represent the weight of medical opinion. Louis G. Psyras, 39 ECAB 264 (1987).

A rationalized medical opinion must include a discussion of the nature of the underlying conditions; their natural or traditional course; how the underlying conditions may have been affected by appellant's employment as determined by medical records covering the period of employment; whether such affects, if any, caused material changes in the underlying conditions; or, if no material changes occurred, would the symptoms or changes indicative of a temporary aggravation have subsided or resolved immediately upon appellant's removal from the employment environment and, if not, at what point would such symptoms or changes have resolved; and whether any aggravation of appellant's underlying conditions caused by factors of his or her employment caused disability during or subsequent to appellant's employment. Newton Ky Chung, 39 ECAB 919 (1988).

Appellant sustained an injury to his low back diagnosed as a low back strain superimposed upon a post-traumatic arthritic left hip. He was treated conservatively and released by his physician to return to work. Appellant subsequently underwent surgery for a total hip replacement and alleged a recurrence of disability, attributing his surgery to the accepted back injury. The case was referred to an impartial medical referee who opined that the employment injury had aggravated appellant's preexisting hip condition which necessitated surgery. The Office determined that the reports of the impartial medical referee were not sufficient and referred appellant for a second impartial examination. The Board found that the reports of the first impartial medical referee constituted the weight of medical opinion and supported appellant's claim and noted that the reports obtained from the second referee physician would not be given any weight as it appeared that the Office was seeking a medical opinion favorable to its view of the case. Harold Weisman, 39 ECAB 961 (1988).

The Board reviews the medical evidence to determine whether the medical report was based on incomplete information, and it looks at such factors as the opportunity for and thoroughness of examination performed by the physician; the accuracy and completeness of the physician's knowledge of the facts and medical history; the care of analysis manifested; and the medical rationale expressed by the physician on the medical issue addressed to him or her by the Office. James T. Johnson, 39 ECAB 1252 (1988).

OFFICE MEDICAL ADVISERS/CONSULTANTS, IN GENERAL

The selection of a percentage of permanent impairment of a member from the allowable range provided in the A.M.A. *Guides* involves a subjective judgment. An Office medical adviser, as a nonexamining physician, cannot select a percentage without any explanation or reference to the examining physician's findings. Such arbitrary selection precludes the Board from making an informed determination of the propriety of the Office medical adviser's calculation of the permanent impairment. John Keller, 39 ECAB 543 (1988).

The opinion of an Office medical adviser that a written x-ray report by a chiropractor did not demonstrate a spinal subluxation of the spine was insufficient to create a conflict in medical opinion with the chiropractors who had obtained the x-ray, viewed the x-ray film, and opined that the film revealed a subluxation of the spine. Glen E. McCarthy, 39 ECAB 603 (1988).

The role of the Office medical adviser is to act as a consultant in reviewing cases under the FECA. Claims examiners make use of the services of medical advisers in adjudicating the issues of causal relationship, extent of disability, degree of permanent impairment, and suitability of work. The Office medical adviser's role is not to act in an adjudicatory capacity or to address legal issues in the case, and the Office should carefully observe the distinction between adjudicatory questions which are not appopriate and medical questions which are appropriate. Vernon E. Gaskins, 39 ECAB 746 (1988).

The Board found that the Office erred by allowing the Office medical adviser to inject his views on the legal issues of the case. Determinations of legal standards in regard to medical questions presented by a case are outside the scope of expertise of the medical adviser or any other physician involved in a case. As noted in FECA Bulletin No. 84-33, questions relating to the acceptance of or weight of medical opinion are in the province of the claims examiner and not the Office medical adviser. The Office medical adviser allowed his disagreement with the Office hearing representative to taint the medical evidence relating to appellant's claim of an employment-related hearing loss. The Board remanded the case to the Office for referral of appellant to an otolaryngologist for examination and medical opinion on appellant's condition. The Board noted that the medical adviser was not to participate further in the case on remand. John W. Butler, 39 ECAB 852 (1988).

WEIGHT OF MEDICAL REPORT, IN GENERAL

The opinion of a physician that a condition is causally related to an employment injury because the employee was asymptomatic before the employment injury is insufficient, without supporting medical rationale, to establish causal relation. Thomas D. Petrylak, 39 ECAB 276 (1987).

Appellant, a letter carrier, was bitten on the left calf by a dog. He sustained a superficial laceration to his leg and returned to light duty. Appellant subsequently stopped work alleging symptoms of dizziness, headaches, and malaise which he related to the dog bite. The Board found that the weight of medical opinion indicated that appellant's complaints did not resemble those resulting from infection with the rabies virus and held that appellant did not establish that his disability for work was due to the employment related injury. Thomas D. Petrylak, 39 ECAB 276 (1987).

The case record contained a page of unsigned notes of medical treatment. These forms, lacking proper identification, could not be considered as probative evidence in support of appellant's claim. Merton J. Sills, 39 ECAB 572 (1988).

A physician's opinion supporting causal relationship between a claimant's disability and a specific employment incident or factors of employment is not dispositive on the issue of causal relationship simply because it is rendered by a physician. To be of probative value to an employee's claim, the physician must provide rationale for the opinion reached. Where no such rationale is present the medical opinion is of diminished probative value. Michael Stockert, 39 ECAB 1186 (1988).

While the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute medical certainty, neither can such opinion be speculative or equivocal. The opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to the employee's federal employment and such opinion on causal relationship must be supported with affirmative evidence, be explained by medical rationale and be based on a complete and accurate medical and factual background. Philip J. Deroo, 39 ECAB 1294 (1988).

An Office audiology consultant is restricted to providing an opinion only on questions presented to him or her concerning the measurement of an employee's hearing loss. Determination of legal standards in regard to such medical questions are outside the role of the audiologist. Warren Guidry, 39 ECAB 1421 (1988).

OFFICE

ABUSE OF DISCRETION

An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are clearly contrary to logic and probable deductions from established facts. The Office's refusal to issue a subponea to compel the attendance of the Office branch Chief of Claims did not constitute an abuse of discretion. William T. McPhee, 39 ECAB 179 (1987); Mark A. Wages, 39 ECAB 282 (1987); Isabel Gamboa 39 ECAB 407 (1987).

CLAIMS

Pursuant to 20 C.F.R. section 10.130 of the Office's regulations, an appellant is entitled to a final decision on each issue alleged, including findings of fact and a decision for or against the payment of compensation which contains a statement explaining the reasons for the decision. Charles L. Zane, 39 ECAB 627 (1988).

COMPENSATION ORDERS, ISSUANCE OF

The Director of the Office filed a motion to remand the case for further development noting that the Office's February 27, 1987 compensation order had not been properly issued because appellant's authorized representative was not sent a copy of the decision on that date. The Director noted that by letter dated April 6, 1987 appellant's authorized representative requested a hearing before the Office and noted that he had not received a copy of the the Office's decision from the Office. The Board set aside the Office's February 27, 1987 decision and remanded the case to the Office for issuance of a *de novo* decision on the subject matter of the February 27, 1987 decision with copies to be sent to appellant, appellant's authorized representative and the employing establishment as provided for in Chapter 2-1400 of the Federal (FECA) Procedure Manual. Charles A. Hinton, 39 ECAB 756 (1988).

HEARINGS, RIGHT TO BEFORE, IN GENERAL

Section 8124(b) of the FECA provides that a claimant not satisfied with the decision of the Office is entitled, upon timely request, to a hearing before a representative of the Office. Henry Moreno, 39 ECAB 475 (1988); Shirley A. Jackson, 39 ECAB 540 (1988); Jeff Micono, 39 ECAB 617 (1988); Richard F. Hines, 39 ECAB 1431 (1988).

The Office, in its broad discretionary authority in the administration of the FECA, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings, and the Office must exercise this discretionary authority in deciding whether to grant a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent. Henry Moreno, 39 ECAB 475 (1988); Shirley A. Jackson, 39 ECAB 540 (1988); Jeff Micono, 39 ECAB 617 (1988).

The Board found that the Office properly exercised its discretionary authority when it denied appellant's request for a hearing. The request was untimely as it was not made within 30 days after issuance of the Office's decision on appellant's claim. Appellant was not entitled to a hearing as a matter of right and the Office exercised its discretion in denying the hearing as additional medical evidence could be submitted to the Office with a request for reconsideration under section 8128(a). Henry Moreno, 39 ECAB 475 (1988); Jeff Micono, 39 ECAB 617 (1988).

The Office failed to exercise its discretionary authority when it denied appellant's request for a hearing. Appellant's request was made following reconsideration under section 8128(a); however, the Office failed to follow its procedures which require that when a hearing request is untimely or made after reconsideration the Office must exercise its discretion and determine whether or not to grant a discretionary hearing and advise the claimant with the reasons for such decision. Shirley A. Jackson, 39 ECAB 540 (1988).

ABANDONMENT OF HEARING REQUEST

A claimant who fails to appear at a scheduled hearing may request in writing within 10 days after the date set for the hearing that another hearing be scheduled. Where good cause for failure to appear is shown, another hearing will be scheduled. The failure of the claimant to request another hearing within 10 days, or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing. Where good cause is shown for failure to appear at the second scheduled hearing, another hearing will be scheduled. Unless extraordinary circumstances such as hospitalization, a death in the family, or similar circumstances which prevent the claimant from appearing are demonstrated, failure of the claimant to appear at the third scheduled hearing shall constitute abandonment of the request for a hearing. Joseph Pilewsky, 39 ECAB 795 (1988); Lela Graham, 39 ECAB 896 (1988); Jack Šucic, 39 ECAB 1338 (1988).

The Board found that the Office did not abuse its discretion in finding that appellant had abandoned his request for a hearing. Appellant's postponement of the first two scheduled hearings constitued a failure to appear at these hearings and appellant failed to show that extraordinary circumstances prevented him from attending the third scheduled hearing. Joseph Pilewsky, 39 ECAB 795 (1988).

Appellant and her authorized representative failed to appear at the time and place set for a third scheduled hearing. She failed to demonstrate any extraordinary circumstances which prevented her from attending and therefore was found to have abandoned her request for a hearing. Lela Graham, 39 ECAB 896 (1988).

At the time appellant requested a hearing, there was no adverse decision to be reviewed as the Office had lifted its prior suspension of the claim once appellant indicated she would undergo medical examination as requested by the Office. As the Office had yet to issue a final decision for or against the payment of compensation, appellant was not entitled to a hearing. Debra A. Kirk, 39 ECAB 1257 (1988).

The Office properly found that appellant abandoned his request for a hearing. Appellant contended that the notice of hearing was mailed to him at his prior address and because he moved he did not receive the hearing notice. The Board found that an appellant bears the responsibility to inform the Office of a change of address and the record established that appellant failed to notify the Office of such change until after the scheduled hearing date. Jack Sucic, 39 ECAB 1338 (1988).

REVIEW OF THE WRITTEN RECORD

Under the Office's regulations effective June 1, 1987, a claimant has a choice of requesting an oral hearing before an Office hearing representative or review of the written record by an Office representative. Once the Office has issued a decision pursuant to a review of the written record, a claimant is not entitled to a subsequent oral hearing. Richard F. Hines, 39 ECAB 1431 (1988).

JURISDICTION

INSURANCE DEDUCTIONS

Neither the Board nor the Office have jurisdiction to determine an employee's coverage or the amount of deductions to be made under the Federal Employees' Group Life Insurance Program. These matters are within the jurisdiction of the Office of Personnel Management. Where an employee disputes the amount of an overpayment consisting of uncollected deductions to be taken for life insurance under this program, the Office should obtain a determination from the Office of Personnel Management of the amount of such deductions including an explanation of the calculations involved. The Office may then use this amount as the amount of the overpayment and, if the employee disagrees with the amount, the employee may appeal to the Office of Personnel Management. Charles Burger, 39 ECAB 732 (1988).

An employee who is already enrolled in the basic life insurance program is entitled to continued coverage at no cost to the employee while he or she is receiving compensation. An employee already enrolled in an optional life insurance program may retain such optional life insurance while receiving compensation if he or she is eligible to continue regular insurance and has had optional life insurance for no less than the five years of service immediately preceding the disability or the full period or periods of service during which optional life insurance was available, if less than five years. Premiums for optional life insurance are withheld from the employee's compensation payments. When an underwithholding of life insurance premiums is discovered, the entire amount is deemed an overpayment of compensation because the Office must pay the full premium to the Office of Personnel Management when the error is discovered. Such overpayment is subject to the waiver provisions of the Act as well as to other statutes and regulations relative to overpayments and collections of debt. Calvin W. Scott, 39 ECAB 1031 (1988).

In response to the Board's request for a legal memorandum, the Director noted that the Office of Personnel Management took the position that health benefit deductions from compensation payments must be retroactive to the date that the deductions cease and, therefore, it was Office of Personnel Management policy which required the Office to treat underdeductions of health benefit premiums as overpayments of compensation and provide the Act's procedures to these overpayments. John E. Rowland, 39 ECAB 1337 (1988).

NATURE OF OFFICE FUNCTION

Proceedings under the FECA are not adversary in nature nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing agency or other government source. Henry Ross, Jr., 39 ECAB 373 (1988); Willie James Clark, 39 ECAB 1311 (1988).

NECESSITY TO FIND FACTS/DISCLOSE BASIS OF DETERMINATION

The FECA provides that the Office shall determine and make findings of fact in making an award for or against payment of compensation after considering the claim presented by the employee and after completing such investigation as the

Office considers necessary with respect to the claim. William A. Giovanoni, 39 ECAB 230 (1987).

Office regulations provide that a final decision shall contain findings of fact and a statement of reasons for the decision being made, a copy of which, together with information as to the claimant's appeal rights, shall be mailed to the claimant. The disallowance or formal denial of a claim for benefits is by a compensation order or letter of denial which must include findings of fact and provide the reasons for the denial in sufficient detail so that a claimant will understand the reasoning behind the rejection of the claim. William A. Giovanoni, 39 ECAB 230 (1987).

Appellant submitted an application for review from letters of the Office addressed to appellant's Senator which concerned the status of the claim before the Office. The Board found that there had been no final decision of the Office issued from which an appeal could be filed. The Office letters informing appellant's Senator as to the status of the pending claim represented an interlocutory action taken by the Office and did not constitute final decisions with respect to the employee's claim for benefits under the Act. The appeal was dismissed. William A. Giovanoni, 39 ECAB 230 (1987).

PROCEDURES OF

The Board found that appellant's claim for an additional schedule award for hearing loss was properly rejected under Chapter 2-801 of the Office's Federal Procedure Manual. Where less than one year has elapsed since the beginning date of a schedule award, and the exposure to noise has not terminated, no additional schedule award will be paid. Appellant must file a new claim for an additional schedule award, with supporting exposure history, for the period subsequent to the time frame involved. Jimmy B. Newell, 39 ECAB 181 (1987).

Section 8137 of the FECA provides for the payment of compensation to employees and their dependents who are neither citizens or residents of the United States. The Office is authorized to adopt the substantive features of a local workers' compensation system or to establish a special schedule of compensation and it may modify these benefits at any time. Further, the Office may discharge all liability of the United States with respect to a particular non-citizen employee by making a lump sum payment under section 8135. Mu-Hyang Ku, 39 ECAB 217 (1987).

Appellant, a letter carrier, twisted his right knee after being startled by a dog. The Board found that the appeal was not in posture with regard to the extent of impairment to appellant's right leg. The Office erred in not following its established procedures for review of medical reports obtained from impartial medical specialists. The Office referred the medical report obtained from the impartial medical referee back to the Office medical adviser whose opinion had created the conflict in medical opinion. FECA Bulletin No. 85-39 sets forth a procedure whereby an Office medical adviser involved in the creation of a conflict in medical opinion may not review the report of the impartial medical examination obtained under section 8123. The Board noted that the medical evidence obtained by the Office following the medical adviser's review of the impartial specialist's report was not compiled pursuant with established Office procedures and therefore would not be given any weight on review. Daniel J. Boyle, 39 ECAB 254 (1987).

Where a conflict in medical opinion exists between a chiropractor and a medical doctor with respect to whether an x-ray film demonstrates the presence of a spinal subluxation, the x-ray film is to be referred with the case record to a Board-certified radiologist for resolution of the conflict. Glen E. McCarthy, 39 ECAB 603 (1988).

The Office's Federal (FECA) Procedure Manual provides that copies of compensation orders must be sent to the claimant, the official superior, and all parties representing or acting on behalf of the claimant, such as attorneys and employee or veteran's organizations. The Board found that the Office compensation order was not properly issued as appellant's authorized representative was not sent a copy of the decision. Thomas A. Harris, 39 ECAB 899 (1988).

The Office's Federal (FECA) Procedure Manual provides that federal program cases (claims brought by employee's of the Department of Labor) may not be serviced except in the National Office by the Branch of Special Claims. Willie C. Christian, 39 ECAB 1114 (1988).

Appellant filed a CA-1 traumatic claim form for severe hives and welts she attributed to exposure to a cleaning solution in her employment. Appellant subsequently filed a CA-2 claim for occupational disease. The Office processed the claims as a single occupational disease claim. Appellant contended that the claims should be separate as she had sustained separate injuries to portions of her anatomy. The Board found that the Office properly processed the claim as a single claim for occupational disease. It was noted that the fact that occupational exposure may affect more than one body part or function does not justify processing the claim separately for each body part or function. Such processing of claims would be frivolous and a duplication of effort and would significantly delay the ultimate disposition of the claim. Debra A. Kirk, 39 ECAB 1257 (1988).

RECONSIDERATION (SEE RECONSIDERATION UNDER SECTION 8128)

SUBPOENA

Section 8126 of the FECA gives the Office the discretion to grant or reject requests for subpoenas to compel the attendance of witnesses within a radius of 100 miles. William T. McPhee, 39 ECAB 179 (1987); Roger Wilcox, 39 ECAB 220 (1987); Isabel Gamboa, 39 ECAB 407 (1988).

The Office's denial of appellant's request to subpoena the Chief of Claims of the district office did not constitute an abuse of discretion. The Board noted that the Chief of Claims was acting in an adjudicatory capacity and could not be subpoenaed to explain his decision rejecting appellant's claim at a hearing before an Office hearing representative unless bad faith or improper conduct in making his decision was shown. William T. McPhee, 39 ECAB 179 (1987).

To establish that the physician selected as the impartial medical specialist in the case had been improperly designated, appellant's attorney requested the Office to subpoena a number of Office employees and produce Office documents related to the medical referral. The Board found that the Office properly denied the request as the Office had considered appellant's objections against the designated impartial specialist and found that the objections raised were insufficient objections against the medical qualifications of the specialist to perform the impartial medical examination. Roger Wilcox, 39 ECAB 220 (1987).

The Office's denial of appellant's request to subpoena an Office medical consultant did not constitute an abuse of discretion. The Board noted that the physician's involvement in the case was limited to guiding the Office in the development of the medical evidence and his medical opinion had not been relied upon by the Office in its decision terminating appellant's compensation benefits. For these reasons, the presence of the medical consultant would not be directly relevant to the issues at the hearing. Isabel Gamboa, 39 ECAB 407 (1988).

OVERPAYMENT OF COMPENSATION (SECTION 8129)

In general

Section 8129(a) of the FECA provides that where an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests as set forth in section 8129(b): Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience. No waiver of an overpayment is possible if the claimant is not without fault in helping to create the overpayment. Patricia E. LaMorte, 39 ECAB 113 (1987); William Phillips, Jr., 39 ECAB 330 (1987); Thomas Donaghue, 39 ECAB 336 (1988); William C. Austin, 39 ECAB 357 (1988); James G. Locke, 39 ECAB 501 (1988); Otilio Leon, 39 ECAB 652 (1988); Richard T. DeVito, 39 ECAB 668 (1988); Walter Asberry, Jr., 39 ECAB 657 (1988); Esther Green, 39 ECAB 727 (1988); Arthur P. West, 39 ECAB 812 (1988); James R. Rowell, 39 ECAB 869 (1988); Calvin W. Scott, 39 ECAB 1031 (1988); Donald R. Schueler, 39 ECAB 1056 (1988); Madge H. Gurr, 39 ECAB 1124 (1988); Helen M. Golden, 39 ECAB 1188 (1988); Henry C. Dolan, 39 ECAB 1206 (1988); Amos Mack, 39 ECAB 1364 (1988); Ronald I. Romano, 39 ECAB 1387 (1988); Gerald R. Brown, 39 ECAB 1417 (1988).

Collection

Appellant's attorney contended that 28 U.S.C. section 2415 barred the Office from recovering any overpayment made more than six years prior to the Office's determination that there was an overpayment. The Board found that the Office was not barred by the six-year period of limitations of 28 U.S.C. section 2415 from recovering an overpayment of compensation made more than six years before the Office determined there was an overpayment. Section 2415(d) applies only when the government seeks to recover an erroneous payment in a civil action in a court of competent jurisdiction and it has no application to section 8129 of the FECA. This interpretation is consistent with the language of section 2415(d), with the legislative history of the section, with the position of the Comptroller General, with subsection (i) of section 2145, and with court decisions on the application of section 2415. Earl C. Poppell, 39 ECAB 1455 (1988).

Dual benefits

Both the Civil Service Retirement Act and the FECA prohibit payment to a federal employee of dual benefits covering the same period. Appellant received both a civil service retirement annuity and compensation for temporary total disability and therefore created an overpayment of compensation. Kenneth E. Miller, 39 ECAB 1196 (1988).

Section 8116 of the Act provides, *inter alia*, that an employee may not receive for the same period compensation for disability and salary, pay or remuneration of any type. Since appellant received both disability compensation and salary for the same period, an overpayment of compensation was created. Donney T. Gala, 39 ECAB 1357 (1988).

Fact of overpayment

The Board found that the case was not in posture for decision on whether an overpayment occurred due to a 3.9 percent consumer price index increase applied to appellant's attendant's allowance. The Board noted that the Office had conducted two audits of appellant's compensation record and had arrived at three differing overpayment figures. None of the Office's calculations clearly demonstrated the amount of overpayment nor appellant's correct rate of compensation for the relevant periods in dispute. The case was remanded to the Office to make detailed findings as to how the overpayment was calculated and whether appellant was paid the correct amount of compensation. George Littleton, 39 ECAB 621 (1988).

The Board found that the case was not in posture for decision on whether an overpayment occurred due to appellant's receipt of compensation at the augmented rate following her divorce from her husband. The Board noted that appellant was not entitled to augmented compensation for her former husband as he was no longer considered a dependent under section 8110(a)(2) of the Act. However, appellant had alleged that her father was totally dependent upon her for support and the Office failed to develop this issue prior to issuing its final overpayment determination. Linda F. Green, 39 ECAB 636 (1988).

Appellant received compensation benefits but the Office did not make deductions for his optional life insurance. The Office found appellant at fault in the creation of an overpayment on the basis that he knew he had elected optional life insurance and that the Office was not collecting for such insurance. The Board found that the case was not in posture for decision. Neither the Board nor the Office has jurisdiction to determine an employee's coverage or the amount of deductions to be made under the Federal Employees' Group Life Insurance Program. Where an employee disputes the amount of an overpayment constituting uncollected deductions to be taken for life insurance under this program, the Office should obtain a determination from the Office of Personnel Management of the amount of such deductions including an explanation of the calculations involved. The Office may then use this amount as the amount of overpayment and if the employee disagrees, he or she may appeal to the Office of Personnel Management. Charles Burger, 39 ECAB 732 (1988).

The Office's regulations require that before seeking to recover an overpayment of compensation, the Office shall provide the individual with written notice of its preliminary finding and of the right to request a prerecoupment hearing or submit additional evidence. These regulations further provide for a final decision only after such a hearing or submission of evidence, or if no hearing is requested or no evidence is submitted within 30 days. Barbara A. Nugent (Kenneth Nugent), 39 ECAB 909 (1988).

The Office did not follow its regulations when it found an overpayment in the amount of $64.00. The Office did not issue a preliminary decision or give appellant the opportunity to respond in a hearing or by written submission, as required by its regulations. The case was remanded for proper adjudication of the overpayment. The Board found appellant to be at fault with respect to the creation of a second overpayment of compensation in the amount of $19,181.30. Barbara A. Nugent (Kenneth Nugent), 39 ECAB 909 (1988).

FAULT

In determining whether an individual is without fault, what constitutes fault depends on whether the facts show that the incorrect payment resulted from: (a) An incorrect statement made by the payee which the payee knew or should have known to be incorrect; (b) Failure of the payee to furnish information which the payee knew or should have known to be material; or (c) Acceptance of a payment which the payee either knew or should have been expected to know was incorrect. Patricia E. LaMorte, 39 ECAB 113 (1987); Robert L. Smith, 39 ECAB 202 (1987); Thomas Donaghue, 39 ECAB 336 (1988); William C. Austin, 39 ECAB 357 (1988); Roger Seay, 39 ECAB 441 (1988); James G. Locke, 39 ECAB 501 (1988); Otilio Leon, 39 ECAB 652 (1988); Richard T. DeVito, 39 ECAB 668 (1988); Walter Asberry, Jr., 39 ECAB 657 (1988); Esther Green, 39 ECAB 727 (1988); Walter T. Chester, 39 ECAB 771 (1988); Arthur P. West, 39 ECAB 812 (1988); James R. Rowell, 39 ECAB 869 (1988); Barbara A. Nugent (Kenneth Nugent), 39 ECAB 909 (1988); Ruth M. Kellogg, 39 ECAB 951 (1988); Calvin W. Scott, 39 ECAB 1031 (1988); Madge H. Gurr, 39 ECAB 1124 (1988); Helen M. Golden, 39 ECAB 1188 (1988); Henry C. Dolan, 39 ECAB 1206 (1988); Donney T. Gala, 39 ECAB 1357 (1988); Amos Mack, 39 ECAB 1364 (1988); Ronald I. Romano, 39 ECAB 1387 (1988); Gerald R. Brown, 39 ECAB 1417 (1988).

An overpayment of compensation was created when claimant, a part-time worker, was paid compensation benefits by the Office based on a five day work week rather than her two day work week. The Board found that appellant was at fault in the creation of the overpayment of compensation based on her knowledge of a prior overpayment of compensation together with the fact that she received a check for approximately two and one-half times the amount of money she would have earned in salary. Appellant either knew or should have known that the amount of compensation she received was incorrect. Patricia E. LaMorte, 39 ECAB 113 (1987).

The Board noted that the Office had informed appellant of his obligation to report his employment as periodically requested on Office form CA-1032. Appellant completed forms submitted by the Office indicating that he had no employment when, in fact, appellant was working part-time as a cashier at a self-serve gas station. The Board found that the Office properly determined that appellant had knowingly failed to report earnings from employment and that his failure resulted in forfeiture of his right to compensation. Appellant was found at fault in the creation of the overpayment. Robert L. Smith, 39 ECAB 202 (1987).

An overpayment of compensation was created as appellant received compensation after his return to work. Appellant returned to duty at a greater rate of pay than that of the position he held when injured. The Board found that he was no longer disabled within the meaning of the Act. Appellant was found at fault in the creation of the overpayment as he accepted three compensation checks after he returned to work. The fact that the Office was negligent in issuing appellant the checks did not excuse appellant's acceptance of such compensation. Thomas Donaghue, 39 ECAB 336 (1988).

The Board found that appellant was at fault in the creation of the overpayment of compensation as he completed and returned to the Office two CA-1032 report forms which indicated that the questions concerning employment and earnings were not applicable to him. Appellant failed to report to the Office that he was self-employed in running a video arcade business, information which the Board found appellant knew or should have known to be material. William C. Austin, 39 ECAB 357 (1988).

The Board found that appellant was at fault in the creation of the overpayment of compensation because he failed to furnish information to the Office concerning his employment as a truck driver which he knew or should have known was material to his claim. Roger Seay, 39 ECAB 441 (1988).

The Board found that appellant was at fault in the creation of the overpayment of compensation because he received both compensation and pay for sick leave during the period of the overpayment. The FECA provides that an employee who receives sick leave pay may not receive compensation for the same period. Appellant had been advised of his responsibility to make an election of benefits and knew or should have known he was not entitled to compensation for a period he received sick leave pay. James G. Locke, 39 ECAB 501 (1988).

The Board found that appellant was at fault in the creation of the overpayment of compensation because he failed to immediately notify the Office of his divorce from his wife. The Office had notified appellant of his responsibility to immediately notify it of any change in the status of his dependents. Although appellant notified the Civil Service Commission of his divorce, notification was not provided to the Office. Otilio Leon, 39 ECAB 652 (1988).

Appellant was found at fault in the creation of the overpayment of compensation because he failed to return a check issued by the Office as he was requested. Upon receipt of the check, appellant accepted the check and deposited the monies into his personal account, despite the specific request of the Office that the check be returned. The evidence established that appellant accepted a payment which he knew or should have known to be incorrect. Richard T. DeVito, 39 ECAB 668 (1988).

The Office transferred from a system of manual payment to a computer system and appellant started to receive checks for total disability in an amount 50 percent greater than the amount which she had been receiving for partial disability. The Board found that appellant was at fault in the creation of the overpayment as the increase in her checks was so great as to establish that she knew or should have known the payments were incorrect. Esther Green, 39 ECAB 727 (1988).

The Office had advised appellant to notify it of any change in his dependency status. Appellant failed to notify the Office of his separation from his wife, and he continued to receive compensation based on the augmented rate. The Board found that appellant was at fault in the creation of the overpayment as he failed to furnish information to the Office which he knew or should have known to be material to his receipt of compensation. Walter T. Chester, 39 ECAB 771 (1988).

The Office inadvertently paid compensation to appellant based on total disability rather than on the correct rate of his loss of wage-earning capacity. In accepting compensation payments representing an increase of $900.00 from that which he had previously received, appellant knew or should have known that such payments were incorrect. Arthur P. West, 39 ECAB 812 (1988).

The Board found that appellant was at fault in the creation of the overpayment as he had returned to work on a part-time basis but continued to receive compensation payments based on total disability. Appellant knew or should have known that the payments were incorrect. James R. Rowell, 39 ECAB 869 (1988).

Appellant received death benefits on behalf of her children under section 8191. She was not entitled to benefits under the Act because she was receiving benefits from the New York City Police Department which exceeded her entitlement under the Act. On August 12, 1982 the Office advised appellant of an administrative change that would limit the amount she received on behalf of her children to 30 percent of the monthly pay of the deceased employee for two minor children, and to 15 percent of the monthly pay for one minor child. The overpayment arose because appellant was paid at 55 percent of her late husband's monthly pay. The Board found that appellant was at fault with regard to the creation of the overpayment because she had been advised as to the administrative changes effective August 12, 1982, and as to the effect the changes would have on her compensation payments. Appellant knew or should have known that the compensation checks she received for almost twice as much as the Office advised her she would be receiving were incorrect payments by the Office. Barbara A. Nugent (Kenneth Nugent), 39 ECAB 909 (1988).

The Board found appellant to be without fault in the creation of the overpayment and reversed the finding of the Office. Following her husband's death, appellant promptly notified the Office of this fact and requested appropriate action be taken. The Office, although notified numerous times that appellant no longer claimed a dependent, continued to pay compensation based on the augmented rate. Since appellant had submitted all the necessary information requested for the period in question and had no reason to believe she was receiving an improper amount of compensation, she was found to be without fault in the creation of the overpayment. The case was remanded to the Office for a determination on whether recovery of the overpayment should be waived. Ruth M. Kellogg, 39 ECAB 951 (1988).

An overpayment was created as the Office did not make deductions for optional life insurance premiums from appellant's compensation benefits. The Office informed appellant by letter of the conditions under which he would receive compensation and the letter showed that the gross and net amounts of compensation were the same because no deductions were made for optional life insurance coverage. Appellant noted the error and made several attempts to amend his records to continue life insurance deductions. The Board found appellant without fault in the creation the overpayment and remanded the case to the Office to consider whether the overpayment should be waived. Calvin W. Scott, 39 ECAB 1031 (1988).

An overpayment was created as appellant was no longer entitled to compensation at the augmented rate following the death of her husband. Appellant was found at fault in the creation of the overpayment as she failed to promptly notify the Office of the change in her dependent status, and only mentioned six months after his death that her husband had ceased to be a dependent. Madge H. Gurr, 39 ECAB 1124 (1988).

Appellant was found to be at fault in the creation of an overpayment of compesation because she received compensation for a period in which she had used annual leave and had received payments related thereto. The Board found that appellant knew or should have known that she was not entitled to both annual leave pay and compensation for the same period. Helen M. Golden, 39 ECAB 1188 (1988).

An overpayment was created as appellant received compensation for disability at the same time that he was receiving benefits under the Civil Service Retirement Act. Appellant was at fault in the creation of the overpayment as appellant had elected to receive benefits from the Office of Personnel Management and acknowledged that he was no longer entitled to FECA benefits. Appellant knew or should have known that the compensation he received after making his election was incorrect. Henry C. Dolan, 39 ECAB 1206 (1988).

In determining whether an individual is with fault in the creation of an overpayment, the Office regulations require consideration of all pertinent circumstances, including age, intelligence, education, and physical and mental condition. The record was replete with letters from appellant to the Office which reveal an alert individual who had diligently monitored the processing of this claim by the Office. Given this pattern of attentiveness to the details of his case, appellant's contention that he assumed the compensation check he received, which created the overpayment, was reimbursement of some expenses related to a separate claim before the Office, was not persuasive, and appellant was found to be at fault in the creation of the overpayment. Donney T. Gala, 39 ECAB 1357 (1988).

At the time appellant received the compensation check which resulted in the overpayment, he did not know that he would subsequently receive back wages from the employing establishment for the same period of time. The Board therefore set aside the Office's determination that appellant was at fault in the creation of the overpayment as the evidence did not establish that he knew or should have known that the payment was incorrect. Amos Mack, 39 ECAB 1364 (1988).

The Board found that appellant was at fault in the creation of the overpayment of compensation. Appellant received compensation checks for temporary total disability for a period of almost three years, during which time he also received wages from employment. Appellant contended that he should not be held at fault because he relied upon an Office letter which permitted him to continue to receive concurrently both wages and compensation. The Board noted, however, that the Office's letter clearly established that this permission was granted for a "short time", and that it was not reasonable on the part of appellant to assume that a "short time" meant an indefinite period of time of almost three years. Ronald I. Romano, 39 ECAB 1387 (1988).

Appellant's claim for compensation was accepted by the Office and it advised him on Office form letter CA-1049 of the gross amount of compensation to which he would be entitled every four weeks. The form letter indicated that no deductions were being made for optional insurance. The Office found that appellant knew or should have known from the fact of the CA-1049 form that deductions from his compensation payments should have been made for optional insurance. The Board found that the CA-1049 form letter only indicated that there was a place for deductions for optional insurance and found that the form was not sufficient to put appellant on notice that such deductions should have been made. The Board noted that there was nothing in the record which should have alerted appellant that he was responsible for continuing payments on optional insurance or that such payments should be deducted from his compensation. Appellant was found to be without fault in the creation of the overpayment and case was remanded to the Office for a determination on the issue of waiver. Gerald R. Brown, 39 ECAB 1417 (1988).

FORFEITURE (SEE FORFEITURE)

INCOME AND ASSETS

The Office's Procedure Manual defines income and assets. An individual's total income includes any funds which may reasonably be considered available for his or her use, regardless of the source. Income to a spouse will not be considered available to the individual unless the spouse was living in the household both at the time the overpayment was incurred and at the time waiver is considered. An individual's assets include: (a) Liquid Assets—cash on hand, the value of stocks, bonds, savings accounts, mutual fund, and the like; and (b) Non-liquid Assets—the fair market value of property such as a camper, second home, extra automobile, jewelry, etc. Assets for these purposes do not include the value of household furnishings, wearing apparel, family automobile, burial plot or prepaid burial contract, a home which the person maintains as the principal family domicile, or income producing property if the income from such property has been included in comparing income and expenses. Earl C. Poppell, 39 ECAB 1455 (1988).

INSURANCE DEDUCTIONS (SEE OFFICE)

RECOVERY

The Board found that under the Debt Collection Act it does not have jurisdiction to consider the matter of a recovery of an overpayment against the salary of a federal employee. The jurisdiction of the Board is limited to appeals from final decisions of the Office arising under the Federal Employees' Compensation Act. Jesse L. Green, 39 ECAB 174 (1987); Robert L. Smith, 39 ECAB 202 (1987); Edward O. Hamilton, 39 ECAB 1131 (1988); Grady N. Stallworth, 39 ECAB 987, 1292 (1988).

The Office's regulations provide at 20 C.F.R. section 10.321(a) that, except for an overpayment resulting from forfeiture of previously paid compensation [under section 8106(b)], whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any resulting hardship upon such individual. Joyce Y. Wescott, 39 ECAB 349 (1988).

Appellant received an overpayment of compensation because she received compensation at the three-fourths dependency rate after her divorce was finalized when she no longer had a dependent. The Board found that the Office improperly increased the amount of withholding from appellant's continuing compensation benefits because it did not develop the evidence to determine the effect of the increased withholding on appellant. The Office cannot ignore section 10.321(a) of its regulations and it must make sure that recovery of an overpayment is made which minimizes the hardship upon the claimant. Joyce Y. Wescott, 39 ECAB 349 (1988).

The Office's regulations concerning recovery of all overpayments specify criteria the Office shall consider in determining the amount to decrease subsequent payments of compensation. The regulations require that the Office have due regard to the probable extent of future compensation payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors so as to minimize any resulting hardship upon such individuals. The Office's collection of this overpayment by withholding 100 percent of appellant's continuing compensation, without considering the effect of such action, was in disregard of the Office's regulations and contrary to the primary purpose of the Act, which is to provide an adequate substitute for an employee's work-related loss of wage-earning capacity. Roger Seay, 39 ECAB 441 (1988).

The Office hearing representative improperly determined the amount of withholding from appellant's future benefits. The hearing representative had relied upon FECA Bulletin No. 87-19 which states that in all overpayment cases the minimum acceptable offset against continuing benefits will be 10 percent of each scheduled payment; or in no case less than what the required offset payment would be for a federal employee who is at the minimum level of pay of Grade 2, Step 1 (currently $62.00). The hearing representative failed to consider the factors provided in 20 C.F.R. section 10.321(a) which states that proper adjustment shall be made having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors so as to minimize any resulting hardship upon the individual. Otilio Leon, 39 ECAB 652 (1988); Esther Green, 39 ECAB 727 (1988); Donald R. Schueler, 39 ECAB 1056 (1988).

The Director filed a petition for reconsideration contending that the Board's decision confused salary offset under 29 C.F.R. Part 20 with administrative offset under 29 C.F.R. Part 20 and incorrectly cited to 29 C.F.R. Part 18 as relating to administrative offset and salary offset under the Debt Collection Act, rather than as relating to rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges. The Board noted that although the misstated law appeared as dicta in the decision because the Board does not have jurisdiction over Office decisions pursuant to the Debt Collection Act, correction was warranted to avoid confusion. The Board noted that Office decisions regarding salary offsets pursuant to the Debt Collection Act are reviewable by the Office of Administrative Law Judge under 29 C.F.R. section 20.74 through 20.90, and that decisions regarding administrative offsets made by the Office pursuant to the Debt Collection Act are not subject to hearings before the Office of Administrative Law Judge, but may be reviewed by the Office upon written request under 29 C.F.R. section 20.19 through 20.37. The Board does not have jurisdiction to review the discretionary authority of the Office with regard to the method of recovery provided under the Debt Collection Act as this involves an offset against the salary of a federal employee as opposed to recovery made against continuing compensation benefits under the FECA. Grady N. Stallworth, 39 ECAB 1292 (1988).

WAIVER

Where an overpayment of compensation has been made because of an error of fact or law, collection of such compensation shall be waived when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the FECA or would be against equity and good conscience. The waiver of an overpayment of compensation by the Office is a matter that rests within its discretion to be exercised pursuant to statutory guidelines. William Phillips, Jr., 39 ECAB 330 (1987).

Chapter 2-901 of the Office's Procedure Manual provides guidelines for the factors considered by the Office in determining whether recovery of an overpayment will defeat the purposes of the Act. To establish that recovery of the overpayment would defeat the purpose of the act, the facts must show that appellant needs subtantially all of his income to meet his current and ordinary living expenses, and also that his assets which were not exempt do not exceed a resource base of $3,000.00 (or $5,000.00 with a spouse or dependent). The Board has found that sections 4.b(1)(a) and (b) of the Procedure Manual were meant to be read conjunctively and a claimant must meet both conditions before recovery would defeat the purposes of the Act. William Phillips, Jr., 39 ECAB 330 (1987); Homer A. Paulson, 39 ECAB 1332 (1988); Earl C. Poppell, 39 ECAB 1455 (1988).

In determining whether recovery of an overpayment is against equity and good conscience, Chapter 2-901 of the Office's Procedure Manual provides that the clause is divided into two parts: financial hardship and detrimental reliance. Financial hardship would be against equity and good conscience when an individual who was never entitled to benefits would experience severe hardship in attempting to repay the debt. Detrimental reliance is considered to be inequitable and against good conscience when a person, in reliance on such payments or on notice that such payments would be made, relinquished a valuable right or changed his or her position for the worse. In making such a decision, the individual's present ability to repay the overpayment is not considered. William Phillips, Jr., 39 ECAB 330 (1987); Homer A. Paulson, 39 ECAB 1332 (1988).

The Board found that the Office did not abuse its discretion in refusing to waive the overpayment of compensation created when deductions for health benefits were inadvertently dropped from appellant's compensation benefits. The financial information submitted by appellant indicated that appellant did not need substantially all of his monthly income to meet his ordinary living expenses so recovery would not defeat the purposes of the Act. Further, consideration of financial hardship was inapplicable in this case as appellant was entitled to compensation under the Act. Finally, the detrimental reliance provision was not applicable because appellant did not allege that he changed his position for the worse or relinquished a valuable right in reliance on payment of compensation benefits. William Phillips, Jr., 39 ECAB 330 (1987).

Appellant filed a claim in 1982 alleging his emotional condition was due to factors of his employment. The claim was originally accepted by the Office and appellant received compensation benefits. The Office subsequently determined that appellant's emotional condition was not sustained in the performance of duty but was self-generated due to his dismissal from work on the basis of willful misconduct. In a prior appeal, 38 ECAB — (1987), the Board reversed a finding by the Office that appellant was at fault in the creation of an overpayment of compensation. The Director of the Office filed a petition for reconsideration contending that appellant was at fault and that an example from the Office's Procedure Manual which had been quoted by the Board did not mandate a finding that appellant was without fault in the creation of the overpayment. The Board granted the Director's petition and reaffirmed the prior decision, as modified, to find that appellant was without fault in the creation of the overpayment as the Office did not show that appellant knew or should have known that information concerning the circumstances surrounding his removal from employment was material. Walter Asberry, Jr., 39 ECAB 657 (1988).

Prior to April 1, 1987 the guidelines governing the Office's recovery of an overpayment from a person found to be without fault were set forth only in Chapter 2-901 of the Federal (FECA) Procedure Manual. On April 1, 1987, sections 10.320 through 10.324 pertaining to overpayments were added to the Office's regulations and became effective June 1, 1987. George E. Dabdoub, 39 ECAB 929 (1988).

Section 10.322(a) of the Office's regulations provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses. Recovery will defeat the purpose of the Act to the extent that (1) the individual from whom recovery is sought needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (2) the individual's assets do not exceed the resource base of $3,000.00 for an individual or $5,000.00 for an individual with a spouse or one dependent plus $600.00 for each additional dependent. This base includes all of the claimant's assets not exempted from recoupment. The first $3,000.00 or more depending on the number of the claimant's dependents is also exempted from recoupment. George E. Dabdoub, 39 ECAB 929 (1988); Donald R. Schueler, 39 ECAB 1056 (1988); Kenneth E. Miller, 39 ECAB 1196 (1988).

Section 10.323 of the Office's regulations provide that recovery of an overpayment is considered to be against equity and good conscience when an individual presently or formerly entitled to benefits would experience severe financial hardship in attempting to repay the debt. The criteria to be applied in determining severe financial hardship are set forth in section 10.322. In the alternative, recovery of an overpayment is considered to be inequitable and against good conscience when an individual, in reliance on such payments or on notice that such payments would be made, relinquished a valuable right or changed his or her position for the worse. In making such a decision, the individual's present ability to repay the overpayment is not considered. To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable; that it cannot be regained; and that the action was based chiefly or solely on reliance on the payments or on the notice of payment. To establish that the individual's position has changed for the worse, it must be shown that the decision made would not otherwise have been made but for the receipt of benefits, and that this decision resulted in a loss. George E. Dabdoub, 39 ECAB 929 (1988); Donald R. Schueler, 39 ECAB 1056 (1988); Kenneth E. Miller, 39 ECAB 1196 (1988).

Appellant did not submit any evidence to establish that waiver of the overpayment was warranted. The Office, on two occasions, requested that appellant submit detailed financial information in support of his request for waiver, but he failed to provide this information to the Office. The Board found that the Office did not abuse its discretion in refusing to waive the overpayment. George E. Dabdoub, 39 ECAB 929 (1988).

Section 10.321(h) of the Office's regulations provides that if additional financial evidence is not submitted, or a prerecoupment hearing is not requested, within 30 days of the Office's preliminary overpayment determination, the Office will issue a final decision based on the available evidence and will initiate appropriate collection action. Marvin J. Henderson, 39 ECAB 1050 (1988).

Following the issuance of the Office's preliminary overpayment determination, appellant failed to submit additional evidence concerning his financial situation or to request a prerecoupment hearing. The Office acted in accordance with the Act and its regulations when it thereafter determined in a final decision that waiver of the overpayment was not warranted and collection of the overpayment commenced. Marvin J. Henderson, 39 ECAB 1050 (1988).

Considering the financial information submitted by appellant, the Board found that recovery of the overpayment would not be against equity and good conscience since there was no evidence that appellant relinquished a valuable right or changed his position for the worse in reliance on the compensation payment he received. Appellant's currently monthly income was over $200.00 greater than his monthly necessary living expenses. Donald R. Schueler, 39 ECAB 1056 (1988).

The Board found that appellant was not entitled to waiver of the overpayment of compensation created when he received compensation for disability at a time he was also receiving an annuity under the Civil Service Retirement Act. Appellant failed to submit to the Office the requisite information pertaining to his financial situation, therefore the Office's decision that recovery would not defeat the purpose of the Act was not improper. Appellant did not allege, nor did the evidence establish, that appellant relinquished a valuable right or changed his position for the worse in reliance of the payment of compensation benefits. The fact that appellant experienced a delay in receiving compensation for his disability or that the Office was responsible for creation of the overpayment did not constitute grounds for justifying waiver of the overpayment. Kenneth E. Miller, 39 ECAB 1196 (1988).

An Office hearing representative did not provide detailed findings of fact or a rationalized opinion on whether recovery of appellant's overpayment would be against equity and good conscience. The Board remanded the case for findings on appellant's contentions that he detrimentally relied on the erroneous amount of compensation by having his wife quit working, and thereby relinquished a valuable right or changed his position for the worse in reliance on the receipt of compensation benefits. Homer A. Paulson, 39 ECAB 1332 (1988).

The Office abused its discretion by refusing to waive appellant's overpayment. The Office did not contend that appellant did not need substantially all of his current income to meet current ordinary and necessary living expenses, but did contend that appellant's assets exceeded the resource base of $5,000.00 for an individual with a spouse. The evidence revealed that appellant exceeded this resource base only if his wife's certificates of deposit, acquired through the sale of her separate property and thus retaining the character of separate property under applicable state law, were included in appellant's assets. The Board found that the Office, in determining that appellant's assets exceeded the resource base of $5,000.00, improperly included the separate property of his wife. The Office's procedure manual states that a claimant's income includes any funds reasonably available and that this includes income of a spouse. However, the procedure manual does not contain a similar provision with regard to assets. The Board explained the reason for this distinction and also noted that the Office had included income produced by the wife's separate property as appellant's income. The Office could not recover appellant's overpayment from his spouse's separate property under applicable state law or Board precedent. Earl C. Poppell, 39 ECAB 1455 (1988).

PEACE CORPS VOLUNTEERS

Section 10.605 of the Office's regulations pertains to conditions of coverage of Peace Corp volunteers while serving abroad. Earl D. Price, 39 ECAB 1053 (1988).

Claimant alleged he contracted diabetes while stationed in Cameroon as a Peace Corps volunteer. The Board found that the medical evidence established that appellant's diabetes condition was a preexisting genetic condition which manifested itself during his service in the Peace Corps and, as such, was not compensable. Earl D. Price, 39 ECAB 1053 (1988).

PERFORMANCE OF DUTY

In general

Congress, in providing for a compensation program for federal employees, did not contemplate an insurance program against any and every injury, illness, or mishap that might befall an employee contemporaneous or coincidental with his employment. Liability does not attach merely upon the existence of an employer-employee relationship. Bruce A. Henderson, 39 ECAB 692 (1988); Edmond B. Wagoner, 39 ECAB 758 (1988); Carla E. Phillips, 39 ECAB 1040 (1988).

The FECA provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty. The term "in the performance of duty" has been interpreted to be the equivalent of the commonly found prerequisite in workers' compensation law "arising out of and in the course of employment." The phrase "arising out of and in the course of employment" encompasses not only the concept that the injury occurred in the work setting, but also the causal concept that the employment caused the injury. Jerry Mills, 39 ECAB 326 (1987); Mark C. Holst, 39 ECAB 496 (1988); Eugene G. Chin, 39 ECAB 598 (1988); Bruce A. Henderson, 39 ECAB 692 (1988); Edmond B. Wagoner, 39 ECAB 758 (1988).

The phrase "course of employment" is recognized as relating to the work situation, and more particularly, relating to elements of time, place and circumstance. In the compensation field, to occur in the course of employment, an injury must occur (1) at a time when the employee may reasonably be said to be engaged in his master's business; (2) at a place where he may reasonably be expected to be in connection with the employment; and (3) while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto. This alone is not sufficient to establish entitlement to benefits for compensability, the concomitant requirement of an injury "arising out of the employment" must be shown, and this encompasses not only the work setting but also a causal concept, the requirement being that the employment caused the injury. In order for an injury to be considered as arising out of the employment, the facts of the case must show some substantial employer benefit is derived or an employment requirement gave rise to the injury. Eugene G. Chin, 39 ECAB 598 (1988); Bruce A. Henderson, 39 ECAB 692 (1988); Carla E. Phillips, 39 ECAB 1040 (1988).

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. Rather, workers' compensation is intended to provide coverage only for certain work-related conditions, not all of the workers' health problems. Jerry C. Gilliam, 39 ECAB 1003 (1988).

BUNKHOUSE RULE

Where an employee is required or expected to live in quarters or premises furnished or made available by his employer and is injured during the reasonable use or occupancy of such premises, the injury arises out of and in the course of employment. The rule is most often applied where the cause of the injury has to do with some part or appurtenance of the premises themselves, i.e., where the employee is injured through a burning of the premises. When awards have been made, the employee is usually engaged in some activity of the general personal-comfort or going-and-coming type, i.e., dressing, bathing, resting, or perhaps visiting coemployees. Edmond B. Wagoner, 39 ECAB 758 (1988).

Appellant sustained a broken right hand when he hit the wall of his apartment with his fist. The Board found that the injury was not sustained in the performance of duty as it occurred outside appellant's working premises, off the employing establishment premises at appellant's apartment, and during an argument with his wife. The fact that the apartment was furnished to appellant by the employing establishment was not sufficient to bring the injury within the performance of duty. Applying the bunkhouse rule, the Board noted that appellant's injury was not sustained during the reasonable use or occupancy of the premises. The activity was not essential to or reasonably incidental with the performance of his temporary duty assignment. Edmond B. Wagoner, 39 ECAB 758 (1988).

EMOTIONAL CONDITIONS (SEE EMOTIONAL CONDITIONS)

EMPLOYMENT FACTORS

An individual who is undergoing vocational rehabilitation in accordance with 5 U.S.C. section 8104 is considered to be in the performance of duty while undergoing training or while going to and from the training institution. If the individual should sustain injury under these circumstances, he or she would be entitled to appropriate compensation benefits. Although these injuries are not job related in the usual sense, they are nevertheless related to the employment in that they occur during the performance of necessary or reasonable activity that would not have been undertaken but for the employment. Elvira B. Lightner (Donald F. Lightner), 39 ECAB 118 (1987).

The Board found that the employee was not in the performance of duty at the time of his death as he was not undergoing vocational rehabilitation in accordance with section 8104 of the Act. The employee, a letter carrier, sustained employment-related injuries to his right knee for which he received compensation for temporary total disability. Following a breakfast meeting with representatives of a private rehabilitation agency, the employee sustained cardiopulmonary arrest and died. The circumstances of the employee's death were found too remote from his federal employment to be considered as arising out of his employment duties. There was no evidence that the employee had participated in a formal job retraining program authorized by the Office, nor was there evidence that the employee received compensation from the Office for participation in a vocational rehabilitation program under section 8104 of the Act. Elvira B. Lightner (Donald F. Lightner), 39 ECAB 118 (1987).

Appellant contended that the deceased employee had become upset because of late compensation payments. The Board noted that this factor was not sufficient to bring the employee's death into the performance of duty. The payment of compensation benefits is an administrative function of the Office from which the employing agency derives no benefit. The receipt of compensation benefits the injured employee and not the employer. Compensation is not a requirement imposed upon the employee and, therefore, it cannot be considered a factor of employment. Elvira B. Lightner (Donald F. Lightner), 39 ECAB 118 (1987).

Appellant alleged he sustained severe stress after being charged with sexual harassment at a meeting with his supervisor. The Board found that appellant's emotional condition did not constitute an injury sustained in the performance of duty. The sexual harassment complaints made against appellant did not arise out of appellant's day-to-day regular duties or out of any specially assigned duties imposed by the employment. Rather, the complaints arose out of appellant's own behavior toward certain female coemployees. Wilbert Kimbrough, 39 ECAB 425 (1988).

Appellant's job as a unit administrator at the Oregon State Military Department required him to maintain membership in the Oregon Army National Guard. In turn, the National Guard required that military members maintain their weight within prescribed height and weight standards. Appellant attributed an emotional condition causally-related to the weight control program imposed by the National Guard and to perceived harassment by superiors and co-workers in both his civilian and military position as a result of his failure to comply with the prescribed weight restrictions. The Board found that the Office properly found it had erroneously accepted appellant's claim. The weight requirement of the National Guard was found to have an insufficient relationship to the performance of his civilian duties. Jerry C. Gilliam, 39 ECAB 1003 (1988).

HORSEPLAY

The Board has distinquished between injury occurring from horseplay among coemployees and injury resulting from private animosity among coemployees. The Board has held that when animosity or a dispute which culminates in an assault is imported into the employment from a claimant's domestic or private life, the assault does not arise out of the employment. John H. Woods, Jr., 39 ECAB 971 (1988).

Appellant alleged he sustained a low back injury when he was kicked by a coemployee while waiting to clock in at work. No further details of the incident were provided in the record for the Board to determine whether appellant's injury was due to horseplay or due to a private dispute imported into the workplace from appellant's private life. The case was remanded to the Office for further development of the evidence. John H. Woods, Jr., 39 ECAB 971 (1988).

MISCONDUCT

Appellant, a housekeeping aid, sustained injury when he was pushed to the ground by police officers employed by the employing establishment. He was arrested and charged with the possession of marijuana and assault on a police officer. The Board found that appellant's injury, although sustained on the employing establishment premises, did not occur in the performance of duty. The Board noted that the injury did not occur while appellant was engaged in the employing establishment's business or in the duties he was employed to perform. The record established that the injuries sustained were the result of appellant's own misconduct as police officers were attempting to search him for suspected possession of an illegal substance. Jerry Mills, 39 ECAB 326 (1988).

OFF-PREMISES INJURY

Appellant sustained a fracture of the right fifth metatarsal when she slipped and fell on a public plaza after she left her duty station and the employing agency's premises. The Board found that the fact appellant was utilizing the only means of egress from the employing establishment premises when she fell did not alter the public characteristics of the plaza nor warrant that it be considered part of the construction premises. Sallie B. Wynecoff, 39 ECAB 186 (1987).

An injury sustained by an employee having fixed hours and a place of work, while going to or coming from work, is generally not compensable because it does not occur in the performance of duty but occurs out of the ordinary nonemployment hazards of the journey itself which are shared by all travelers. Sallie B. Wynecoff, 39 ECAB 186 (1987).

The proximity rule has been defined by the Board as holding that under special circumstances the industrial premises are constructively extended to hazardous conditions which are proximately located to the premises and may therefore be considered as hazards of the employing establishment. The primary consideration in applying the rule is whether the conditions giving rise to the injury are causally connected to the employment. Sallie B. Wynecoff, 39 ECAB 186 (1987).

Appellant sustained injury when he was shot by an assailant. The Board found that appellant's injury did not arise out of his employment as he had left the employing establishment premises after work and was injured as a result of a personal dispute between a fellow employee and her assailant. Appellant failed to submit evidence showing some substantial employer benefit derived from his actions, and his assistance in coming to the aid of his coemployee was an entirely personal matter as the coemployee was not engaged in the performance of her duties. Eugene G. Chin, 39 ECAB 598 (1988).

When an employee suffers additional injuries because of an accident in the course of a journey to a doctor's office occasioned by a compensable injury, the additional injuries are generally held compensable. Exceptions to this principle arise when there is some added factor weakening the causal connection such as doubt about whether the trip was really authorized, when the purpose of the trip was not treatment by a doctor but examination for purposes of meeting the employer's requirement of a physicial fitness certificate, or when the orginal injury was not work connected. Bruce A. Henderson, 39 ECAB 692 (1988).

Appellant filed a claim for multiple fractures sustained in a motor vehicle accident. At the time of injury, appellant was returning from his doctor's office where he had received treatment for an employment-related back strain. The Board found that appellant's injuries from the motor vehicle accident were sustained in the performance of duty. The purpose of appellant's visit to his doctor's office was for treatment of his employment-related back strain and the site of the accident was on a direct route between the doctor's office and appellant's home. A majority of the Board noted that while appellant had briefly deviated from his journey by stopping at the employing establishment, he had completed this deviation at the time of the accident and had resumed his "business" route home. Bruce A. Henderson, 39 ECAB 692 (1988).

PREMISES DOCTRINE

The "course of employment" for employees having a fixed time and place of work embraces a reasonable time interval before official working hours while the employee is on the premises engaged in preparatory or incidental acts. Mark C. Holst, 39 ECAB 496 (1988).

Appellant sustained injury on the employing establishment premises when he went to pick up his paycheck on a day he was not scheduled to work. The Board found that appellant's injury was not sustained in the performance of duty as no substantial employer benefit or requirement of the employment was shown for appellant's returning to the employing establishment premises on his day off. Mark C. Holst, 39 ECAB 496 (1988).

Under the FECA, an injury sustained by a plant employee, having fixed hours and place of work, while going to or coming from work is generally not compensable because it does not occur in the performance of duty. However, exceptions to this rule have been declared and one such exception is the premises rule: an employee driving to and from work is covered under workers' compensation while on the premises of the employer. Hope J. Kahler (Roger A. Kahler), 39 ECAB 588 (1988).

The employee was killed in an automobile accident which occurred at a location which was found to be part of the premises of the employing establishment. The site of the accident was the shoulder of a roadway on which the employing establishment was located. Although the public was not prohibited from using the roadway, this fact did not preclude it from being considered as part of the "premises" of the employing establishment. The Board found that the roadway was so interrelated with the employing establishment that it could be treated as though it was the actual premises of the employing establishment. Hope J. Kahler (Roger A. Kahler), 39 ECAB 588 (1988).

The Office accepted appellant's claim for death benefits on the basis that the employee's fatal accident occurred on the employing establishment premises during regular working hours. Autopsy reports revealed that at the time of death, the employee was intoxicated and police records indicated that he had been speeding. The Office subsequently rescinded its acceptance of appellant's claim finding that the employee was not in the performance of duty at the time of his fatal accident. The Board reversed the decision of the Office and noted that the Office could not invoke the affirmative defense of intoxication for the first time on appeal to the Board. An allegation of intoxication is an affirmative defense against payment of compensation and must be raised during the original adjudication of the case. Hope J. Kahler (Roger A. Kahler), 39 ECAB 588 (1988).

RECREATION

The general criteria for performance of duty as it relates to recreational and social activities is set forth in *Larson* as follows: "Recreational or social activities are within the course of employment when: (1) They occur on the premises during a lunch or recreation period as a regular incident of the employment; or (2) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or (3) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life." Carolyn A. Campeau, 39 ECAB 386 (1988); Lindsay A.C. Moulton (Dr. David G. Moulton), 39 ECAB 434 (1988); William D. Zerrillo, 39 ECAB 525 (1988).

Appellant sustained a low back strain while bowling at bowling lanes on the employing establishment premises. The Board found that appellant's injury was not sustained in the performance of duty. The evidence established that employees voluntarily formed a bowling league which was financially supported and maintained by league members. The fact that major operational maintenance of the bowling alleys was handled by the employing establishment was not sufficient to bring appellant's injury within the performance of duty in light of the fact that the bowling alleys were provided primarily for patients at the hospital; were made available to league members one night a week after regular working hours; and that league members provided their own minor operating maintenance. Carolyn A. Campeau, 39 ECAB 386 (1988).

The employee died while attending a conference on brain research in Keystone, Colorado where he was to present the results of employing establishment research. He collapsed due to cardiac arrest while skiing. The Board found that the employee's death did not occur in the performance of duty. The Board noted that the employee was within the performance of duty while attending the conference and related professional meetings as such activities were contemplated as incidental to the employment; however, the employee died while engaged in recreational activities which were not a regular incident of his employment. The fact that the recreational activity occurred at the site of the conference was not by itself sufficient to show that the employee's death was in the performance of duty. Lindsay A.C. Moulton (Dr. David G. Moulton), 39 ECAB 434 (1988).

Appellant sustained an injury to his left achilles tendon while exercising at a private health club after his regular work hours. He alleged that the injury occurred while he was engaged in a planned exercise program which enabled appellant to stay qualified in his area of employment which had stringent physical requirements. The Board found that appellant's injury was not sustained in the performance of duty. Appellant was not injured on the employing establishment premises during a lunch or recreation break nor was appellant required by the employing establishment to participate in an exercise program in order to prepare himself to pass the annual endurance test which qualified him to retain his position. The employing establishment did not sponsor the exercise program held at the private health club where appellant was injured and the fact the employing establishment implemented a fitness program subsequent to appellant's injury was irrelevant. The Board noted that the employing establishment did not derive any substantial benefit from appellant's participation in the exercise program other than the intangible improvement in employee health and morale common to all kinds of recreation. William D. Zerrillo, 39 ECAB 525 (1988).

TRAVEL, SPECIAL MISSION OR TEMPORARY DUTY

An employee whose work entails travel away from the employer's premises is held to be within the course of his or her employment continuously during the trip, except when a distinct departure on a personal errand is shown. The Board has recognized the rule that the FECA covers an employee 24 hours a day when he or she is on travel status or on a temporary duty assignment or a special mission and engaged in activities essential or incidental to such duties. However, the fact that an employee is on travel status, a special mission or temporary duty does not raise an inference that the condition or injury claimed is causally related to factors of the employment. Richard Michael Landry, 39 ECAB 232 (1987); Carl Paul Johnson, 39 ECAB 470 (1988); Cherie L. Hutchings, 39 ECAB 639 (1988); Kenneth R. McCabe, 39 ECAB 1108 (1988).

When an employee deviates from the normal incidents of his or her trip and engages in activities, personal or otherwise, which are not reasonably incidental to the duties of the temporary assignment contemplated by the employer, the employee ceases to be under the protection of the Act and any injury occurring during these deviations is not compensable. Richard Michael Landry, 39 ECAB 232 (1987).

Appellant, assigned to temporary duty in Norman, Oklahoma, sustained injury when he was thrown from the bed of the truck in which he was riding. The Board found that the evidence of record established that appellant was injured while engaged in activies of a personal and recreational nature and not activities reasonably incidental to his temporary duty assignment. Appellant was not in the performance of duty when injured. Richard Michael Landry, 39 ECAB 232 (1987).

The employee died while attending a conference on brain research in Keystone, Colorado where he was to present the results of employing establishment research. He collapsed due to cardiac arrest while skiing. The Board found that the employee's death did not occur in the performance of duty. The Board noted that the employee was within the performance of duty while attending the conference and related professional meetings as such activities were contemplated as incidental to the employment; however, the employee died while engaged in recreational activities which were not a regular incident of his employment. The fact that the recreational activity occurred at the site of the conference was not by itself sufficient to show that the employee's death was in the performance of duty. Lindsay A.C. Moulton (Dr. David G. Moulton), 39 ECAB 434 (1988).

An injury is compensable if the obligations or conditions of employment create a "zone of special danger" out of which the injury arose. If an employee is sent by his employer to a place where adequate medical facilities are not available or obtainable for a condition unrelated to the employment, and as a result thereof, or because of a delay in obtaining needed medical treatment, injury results which would not have occurred had the stricken employee had normal access to proper medical care, such inadequacy of medical facilities or delay in obtaining treatment constitutes a risk incidental to the employment-related travel and any consequent disability is compensable. Carl Paul Johnson, 39 ECAB 470 (1988).

Appellant was assigned to temporary duty in Los Angeles to attend a conference. He sustained a detached retina following his arrival at the temporary duty location. Appellant did not submit any medical evidence to relate the eye condition to his federal employment; rather, appellant alleged that the condition was incidental to his employment because his temporary duty caused a delay in seeking medical treatment. The Board found that appellant's eye condition was not compensable. The reason provided by appellant for not seeking immediate medical attention in Los Angeles was his stated preference to be treated by his family physician in Ohio. The delay in obtaining medical care was not due to a lack of adequate medical facilities in the Los Angeles vicinity. Carl Paul Johnson, 39 ECAB 470 (1988).

Appellant, on temporary duty to Reno, Nevada, awoke one morning and found she had contracted contact dermatitis and developed a rash on both arms, face, neck, left shoulder and right leg. The Board found that appellant's skin condition was not compensable as the medical evidence of record did not establish that it developed from activities incidental to her employment. Cherie L. Hutchings, 39 ECAB 639 (1988).

Appellant was in a travel status to Salt Lake City, Utah to permanently relocate there from Sacramento, California. Appellant sustained the traumatic amputation of several fingers while mowing the lawn of his temporary living premises. The Board found that appellant's injury was not sustained in the performance of duty as mowing the lawn was not an activity reasonably incidental to appellant's employment. Kenneth R. McCabe, 39 ECAB 1108 (1988).

PROCEDURE ON APPEAL TO OR REVIEW BY BOARD

AFFIRMATIVE DEFENSES

An allegation of intoxication is an affirmative defense against payment of compensation that would otherwise be due, and the proper place to raise such a defense is during the original adjudication of the claim. The Office is precluded from raising the affirmative defense of intoxication for the first time on appeal to the Board. Hope J. Kahler (Roger A. Kahler), 39 ECAB 588 (1988).

JURISDICTION OF BOARD

The Board's *Rules of Procedure* (20 C.F.R. Part 501) provide that an incomplete application for review shall be returned to the applicant seeking review by the Board and a reasonable opportunity allowed for furnishing additional necessary information. Edward Holt, 39 ECAB 191 (1987).

The application for review submitted by appellant failed to specify the date of the Office decision being appealed or to provide other information relevant to the filing of an appeal. Fourteen months following the Board's request that additional needed information be submitted, appellant submitted a completed application for review. The Board found that 14 months was outside the "reasonable opportunity" allowed under the Code of Federal Regulations for the submission of additional information and did not constitute perfection of the appeal retroactively to the date of the initial appeal request. The appeal was dismissed. Edward Holt, 39 ECAB 191 (1988).

Under the Board's *Rules of Procedure*, only a person "adversely affected" by a final decision of the Office may file an application for review. As the Office had vacated its final decision and accepted appellant's claim, appellant was no longer "adversely affected" by the Office's decision. For this reason, the appeal was dismissed by order of the Board. Wayne O. Roberts, 39 ECAB 356 (1988).

Appellant alleged that the employing establishment forced her to use sick leave instead of allowing her to be in a leave without pay status. This allegation concerns matters over which neither the Board nor the Office have jurisdiction. These are matters which come within the jurisdiction of the Office of Personnel Management. Although section 8118(c) of the Act provides that an employee may use annual or sick leave at the time of his or her disability, this choice is subject to the availability of such leave to the employee and any regulations promulgated by the Office of Personnel Management regarding the use of leave by a federal employee. Helen M. Golden, 39 ECAB 1188 (1988).

PULMONARY OR RESPIRATORY CONDITIONS

ASBESTOS-RELATED

Appellant, a sandblaster, filed a claim alleging he contracted asthma and a sinus condition due to his federal employment. Following pulmonary function studies, the Office accepted appellant's claim for pleural thickening secondary to asbestos exposure and transitory precipitation of asthma. The Board reviewed schedule awards issued to appellant for permanent impairment to both lungs. James C. Hall, Sr., 39 ECAB 342 (1988).

Appellant, an electrician, filed a claim alleging he sustained asbestosis which he attributed to his federal employment. The Board found that appellant did not meet his burden of proving that he had a disabling pulmonary condition related to his exposure to asbestos in his federal employment. The medical evidence of record did not establish that appellant had any permanent impairment of his lungs causing disability for work and he was not entitled to a schedule award. The Board noted further that appellant's date of last exposure was prior to the effective date of the

1974 amendments which provided for schedule awards for the lungs. Nino V. DiGrezio, 39 ECAB 366 (1988).

Appellant alleged asbestosis which he attributed to his federal employment as a rigger. The Board found that the case was not in posture for decision due to a conflict in medical opinion which necessitated the referral of appellant to an impartial medical specialist under section 8123(a) of the Act. Robert H. Evans, 39 ECAB 583 (1988).

Appellant alleged a pulmonary condition secondary to exposure to asbestos in his federal employment. The medical evidence established that appellant had emphysema and an obstructive disease, and that the small amount of pleural thickening seen on chest x-rays was too slight to account for appellant's restrictive pathology. The Office properly rejected appellant's claim as his disability was found to be obtructive in nature and not causally related to his asbestos exposure. Frederick Howard, 39 ECAB 1084 (1988).

ASTHMA OR OTHER CONDITION

Appellant, a sandblaster, filed a claim alleging he contracted asthma and a sinus condition due to his federal employment. Following pulmonary function studies, the Office accepted appellant's claim for pleural thickening secondary to asbestos exposure and transitory precipitation of asthma. The Board reviewed schedule awards issued to appellant for permanent impairment to both lungs. James C. Hall, Sr., 39 ECAB 342 (1988).

Appellant alleged that his occupational exposure to chemicals and fumes caused or aggravated his asthmatic or allergic rhinitis condition. The Board found that the case was not in posture for decision due to a conflict in medical opinion between appellant's attending physician, who stated that appellant had severe allergic rhinitis which was aggravated by his exposure to chemical solutions at work, and the opinion of an Office referral physician who opined that appellant had developed asthma coincidentally with and independently of his work with chemicals and fumes. The case was remanded to the Office to refer appellant for examination under section 8123(a) of the Act. Mathew S. Dixon, 39 ECAB 397 (1988).

Appellant was exposed to chemicals and pathogenic agents in his employment from 1973 to 1979. Despite requests, the employing establishment failed to furnish the Office with a list of the chemicals to which appellant may have been exposed and the extent, duration, and associated information concerning any such exposure. While the evidence submitted by appellant was not sufficient to establish his claim of a respiratory condition, the case was remanded to the Office for further development by obtaining the results of any industrial hygiene studies taken of appellant's workplace and a list of past and present chemicals or other agents in the workplace. Willie James Clark, 39 ECAB 1311 (1988).

FUMES

Appellant sustained a facial burn due to fumes from an oil pit at the employing establishment. He alleged that his exposure to dust and fumes also aggravated his chronic obstructive pulmonary disease. The Board found that the case was not in posture for decision due to an unresolved conflict in medical opinion on whether appellant's employment caused a permanent or temporary aggravation of his pulmonary condition. The case was remanded to the Office to refer appellant for an impartial medical examination pursuant to 5 U.S.C. section 8123(a). Leonard M. Thompson, 39 ECAB 487 (1988).

Schedule awards (see schedule awards)

Tobacco exposure

The weight of medical evidence established that appellant's disability due to a respiratory condition causally related to his exposure to tobacco smoke at work had ceased. On a prior appeal the Board found that the report of an Office referral physician established that the employment-related disability ceased. The reports submitted by appellant following the Board's prior decision did not refute the referral physician's opinion that exposure to tobacco smoke caused only a temporary aggravation of appellant's asthma. Appellant was entitled to compensation for the periods of disability related to the temporary aggravation of his asthma attacks, and had been paid compensation for almost ten years following his retirement and last possible exposure to employment-related tobacco smoke. Gaeten F. Valenza, 39 ECAB 1349 (1988).

RADIATION

Eye conditions

The Board found that the appeal was not in posture for a determination of whether appellant's eye condition was causally related to occupational exposure to radiation. A conflict in medical opinion between appellant's attending physician and an Office referral medical panel necessitated the referral of appellant for an impartial medical examination under section 8123(a) of the FECA. Enzio A. Muto, 39 ECAB 108 (1987).

The Board found that the appeal was not in posture for a determination on whether appellant's eye condition was causally related to alleged occupational exposure to radiation. A conflict in medical opinion was created between appellant's attending physicians and an Office medical adviser. The case was referred to an impartial medical specialist under section 8123(a); however, the statement of accepted facts prepared by the Office was incomplete with regard to appellant's exposure to nonionizing radiation. The Office subsequently determined that the impartial specialist's report was insufficient to resolve the conflict because of the inadequate occupational exposure data he relied upon in formulating his medical opinion. The Office thereafter referred the case record for review by a "Radiation Expert Medical Panel." Based on the Panel's report, the Office found that appellant's eye condition was not causally related to factors of his federal employment. On appeal, the Board noted that the Office erred in selecting the medical panel because the Office failed to follow its established procedures for the selection of a second impartial medical specialist on the disputed issue. The Board also noted that the selection of the medical panel was open to the suspicion that the Office shopped around for the purpose of securing a medical opinion favorable to its view. The Board found that there remained an unresolved conflict in medical opinion which necessitated the referral of appellant to another impartial medical specialist. Warner E. Armbruster, 39 ECAB 131 (1987).

Appellant alleged that his bilateral subcapsular cataract condition was causally related to occupational exposure to nonionizing radiation. The Board found that there existed a conflict in medical opinion necessitating the referral of appellant to an impartial medical specialist. As appellant's attorney had requested to participate in the selection of the impartial specialist, the Board directed that the Office follow the procedures set forth in the Office Procedure Manual. Douglas L. Hock, 39 ECAB 1270 (1988).

RECONSIDERATION UNDER SECTION 8128

To require the Office to reopen a case for reconsideration under section 8128(a) of the Act, a claimant must submit relevant evidence not previously of record or advance legal contentions not previously considered. Where such evidence or contentions are not present, it is a matter of discretion on the part of the Office whether to reopen a case for further merit review. Artemio R. Alipio, 39 ECAB 570 (1988); Kelmeth Kilgore, 39 ECAB 900 (1988); Frederick Howard, 39 ECAB 1084 (1988); Helen E. Tschantz, 39 ECAB 1382 (1988).

On reconsideration, appellant presented arguments which were found by the Board to constitute new legal contentions concerning the March 10, 1982 International Agreement entered between the United States and the Republic of the Philippines and the special schedule of compensation provided noncitizen employees of the United States under the FECA. As these contentions were not previously considered by the Office, the case was remanded for consideration of the new legal contentions raised by appellant. Artemio R. Alipio, 39 ECAB 570 (1988).

The Board found that where appellant failed to submit specific financial information as requested by the Office, his general contentions that he needed additional income to get his life back into order and gain custody of his son were not relevant new evidence to warrant a review on the merits of the Office's prior overpayment decision. Kelmeth Kilgore, 39 ECAB 900 (1988).

A claimant has a right under section 8128 of the Act to secure review by the adjudicating agency of a decision where he presents new evidence relevant to his contention that the decision is erroneous. The presentation of such relevant new evidence creates a necessity for review of the full case record; that is, all of the evidence, in order to properly determine whether the newly supplied evidence, considered with that previously in the record, shifted the weight of the evidence in such a manner as to require a modification of the earlier decision. If the Office determines that the new evidence lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on its merits. Joseph R. Alsing, 39 ECAB 1012 (1988).

The Board found that the Office's refusal to reopen appellant's case for further review on the merits of his claim for continuing compensation for disability constituted an abuse of discretion. Appellant submitted new evidence relevant to the issue and in support of his contention that the prior decision was erroneous. It was sufficient to require that the Office review the case on its merits. Joseph R. Alsing, 39 ECAB 1012 (1988).

The Office's refusal to reopen appellant's case for further merit review did not constitute an abuse of discretion. Appellant, through his attorney, submitted a letter which gave his interpretation of the examining physician's report contending that the medical report was not dispositive of the issue of whether appellant's pulmonary condition was causally related to his asbestos exposure. The Board found that the medical report constituted the weight of medical opinion and that the letter from appellant's attorney was repetitious and duplicative of the evidence in the case file. Frederick Howard, 39 ECAB 1084 (1988).

To require the Office to reopen a case for merit review under section 8128, the Office's regulations provide in relevant part that a claimant may obtain review on the merits of his or her claim by written request to the Office identifying the decision and specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed. This can be established by (1) showing that the Office erroneously applied or interpreted a point of law; or by (2) advancing a point of law or fact not previously considered by the Office; or by (3) submitting relevant and pertinent evidence not previously considered by the Office. Philip J. Deroo, 39 ECAB 1294 (1988).

The Office's refusal to reopen appellant's case for review on the merits did not constitute an abuse of discretion. The evidence submitted by appellant was duplicative of evidence already in the case record and did not constitute a basis for reopening the case. Philip J. Deroo, 39 ECAB 1294 (1988).

The Board found that the Office's refusal to reopen appellant's case for a merit review was improper. The Office denied appellant's request for reconsideration on the basis that the evidence submitted was cumulative and repetitious in nature. This is not a proper basis for determination of whether merit review is warranted in a particular case. Evidence submitted in support of reconsideration is not weighed to determine whether or not the majority of such evidence is cumulative, duplicative or repetitious. If a claimant submits evidence which is relevant and not previously of record then, regardless of the number of additional reports or documents submitted which may be of no evidentiary value, the Office is nevertheless required to conduct a merit review of the case. The requirements for reopening a claim for a merit review do not include that a claimant submit all evidence which may be necessary to discharge his burden of proof. The requirements only specify that the evidence be relevant and not previously considered by the Office. Helen E. Tschantz, 39 ECAB 1382 (1988).

SCHEDULE AWARDS

AMA GUIDES

The schedule award provisions of the FECA set forth the number of weeks of compensation to be paid for permanent loss of use of the members listed in the schedule. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determinations is a matter which rests in the sound discretion of the Office. However, as a matter of administrative practice and to insure consistent results to all claimants, the Office has adopted and the Board has approved of the A.M.A. *Guides to the Evaluation of Permanent Impairment* as the uniform standard applicable to all claimants. Jimmy B. Newell, 39 ECAB 181 (1987); Benjamin Swain, 39 ECAB 448 (1988); Richard W. Robinson, 39 ECAB 484 (1988); John Constantin, 39 ECAB 1090 (1988).

The A.M.A. *Guides* have established a table consisting of four classes of respiratory impairment: Class 1 (0 percent impairment); Class 2 (10–25 percent mild impairment); Class 3 (30–45 percent moderate impairment); and Class 4 (50–100 percent severe impairment). Under this table if one of the three tests for ventilatory function, i.e., FVC, FEV-1, or the FEV-1/FVC ratio, are abnormal to the degree described for Classes 2, 3, and 4, the individual is deemed to have pulmonary impairment. James C. Hall, Sr., 39 ECAB 342 (1988); Raymond D.K. Lau, 39 ECAB 1103 (1988); Garnett J. Rodgers, 39 ECAB 1209 (1988).

With respect to permanent impairment of the extremities, the standards for evaluating percentage of impairment under the A.M.A. *Guides* are based primarily on loss of range of motion. All factors which prevent a limb from functioning normally should be considered together with the loss of motion in evaluating the degree of permanent loss of use for schedule award purposes. In determining the extent of loss of motion, the specific functional impairments [such as loss of flexion or extension] should be itemized and stated in terms of percentage loss of use of the member in accordance with the A.M.A. *Guides* tables. James E. Jenkins, 39 ECAB 860 (1988).

ARMS

The Board found that the Office medical adviser did not properly calculate the total impairment of appellant's left upper extremity. The Board reviewed the medical adviser's report and, applying the A.M.A. *Guides*, noted where he had erred in calculating the total upper extremity impairment contributed by the hand. The case was remanded to the Office to recalculate appellant's left upper extremity impairment in conformance with the A.M.A. *Guides*, Richard W. Robinson, 39 ECAB 484 (1988).

The case was not in posture for decision on the percentage of permanent impairment to appellant's left arm. The Board noted that the impartial medical specialist did not indicate that appellant's condition had reached maximum medical improvement and did not contain an estimate of the percentage of impairment as required under the Office's Procedure Manual. An Office medical adviser who provided an opinion on the extent of impairment to appellant's left arm did not fully explain how he estimated his determination of impairment due to pain, discomfort, or loss of sensation or explain the values he provided for loss of strength. The Board noted that the Office medical adviser, as a nonexamining physician, cannot select a percentage of impairment without any explanation or reference to the examining physician's findings. John Keller, 39 ECAB 543 (1988).

In a prior appeal the Board remanded the case to request clarification from the examining physician as to appellant's physical impairment under the A.M.A. *Guides*. The supplemental report failed to address appellant's impairment in terms of the *Guides* and the Office properly referred the case record to an Office medical adviser for computation of the percentage of impairment. David E. Fishback, 39 ECAB 783 (1988).

CONCURRENT PAYMENTS

A claimant is not entitled to dual workers' compensation benefits for the same injury. He or she may not receive compensation for temporary total disability and compensation under a schedule award covering the same period of time. Benjamin Swain, 39 ECAB 448 (1988).

DISFIGUREMENT

In an appeal involving facial disfigurement, the question before the Board is whether the amount awarded by the Office was based upon sound and considered judgment and was proper and equitable under the circumstances provided by section 8107(c)(21) of the Act. The Office Deputy Commissioner, Assistant Deputy Commissioner, the Chief of the Branch of Claims, the District Director and similar officials have, because of their experience, the status of experts in evaluating disfigurement for schedule award purposes so long as they personally view the disfigurement. In determining what constitutes proper and equitable compensation for disfigurement, sound judgment and equitable evaluation must be exercised as to the likely economic effect of an employee's disfigurement in securing and maintaining employment. The Board will not interfere with or set aside a disfigurement determination of the Office unless it is clearly in error. Mark A. Wages, 39 ECAB 282 (1987).

Appellant sustained injury to his head and face in a motor vehicle collision. The Board found that the Office, in determining the amount of the schedule award for facial disfigurement, did not abuse its discretion. The Board noted that the Office properly did not consider scars on appellant's scalp which were hidden by his hair as they did not constitute facial disfigurement. Mark A. Wages, 39 ECAB 282 (1987).

FACTORS IN CALCULATING IMPAIRMENT

The Office Federal (FECA) Procedure Manual provides that in obtaining medical evidence required for a schedule award, the evaluation made by the attending physician must include a detailed description of the impairment. This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations. Additional reports should be required of the physician where the initial report does not meet this test. James E. Jenkins, 39 ECAB 860 (1988).

Basing a schedule award on the loss of motion from an individual's own range of motion injects too much variability into the calculation of schedule awards and would result in inconsistent awards, defeating the purpose of adoption of uniform standards. John Constantin, 39 ECAB 1090 (1988).

The Board found that an Office medical adviser did not properly apply the A.M.A. *Guides* in calculating that appellant had a 15 percent impairment of the right lower extremity. In calculating appellant's range of motion, the medical adviser compared the loss of motion of appellant's right knee compared with the range of motion of appellant's left knee. The Board noted that in determining the extent of permanent impairment, all claimants must be measured against the ranges of motion provided in the A.M.A. *Guides*. John Constantin, 39 ECAB 1090 (1988).

HAND

The Board reviewed the Office medical adviser's report which had calculated a total 12 percent impairment of the left hand based on the impairment contributed by the joints of the fingers to each digit of the hand and the impairment that each finger contributed to the left hand. Applying the A.M.A. *Guides*, the Board found that the actual impairment contributed to the left hand by each finger should have been 16 percent. Richard W. Robinson, 39 ECAB 484 (1988).

The case was not in posture as to whether appellant had more than a 10 percent impairment of the right hand. The Board noted that Office medical advisers reviewing the case had failed to accurately calculate the extent of permanent impairment to appellant's right hand in conformance with the A.M.A. *Guides*. The case was remanded to the Office for a determination of the permanent impairment of appellant's right hand applying Chapter 2 and Chapter 11 of the *Guides*. Kenneth Nichols, 39 ECAB 843 (1988).

HEARING LOSS

The Board found that appellant's claim for an additional schedule award for hearing loss was properly rejected under Chapter 2-801 of the Office's Federal Procedure Manual. Where less than one year has elapsed since the beginning date of a schedule award and the exposure to noise has not terminated, no additional schedule award will be paid. Appellant must file a new claim for an additional schedule award, with supporting exposure history, for the period subsequent to the time frame involved. Jimmy B. Newell, 39 ECAB 181 (1987).

On February 24, 1986 the Office adopted a new standard for determining the extent of permanent impairment in hearing loss cases. This standard is based on the formula contained in the second edition to the A.M.A. *Guides* published in 1984. As noted by Office Program Memorandum No. 272: The A.M.A.'s formula calculates the hearing loss for one ear (monaural) by testing for hearing loss at the 500, 1,000, 2,000, and 3,000 cycles per second frequency levels. The losses at each frequency are added up and averaged and, using ANSI-ISO standards, the "fence" of 25 decibels is deducted from the average loss. The result is multiplied by 1.5 to arrive at monaural hearing loss. To determine the loss for both ears (binaural), the loss in each ear is calculated using the formula for monaural loss. The lesser loss is multiplied by 5, then added to the greater loss. The total is divided by 6 to arrive at the binaural loss. This standard was made applicable to all hearing loss evaluations made on or after February 24, 1986. Benjamin Swain, 39 ECAB 448 (1988); Henry Moreno, 39 ECAB 475 (1988); Charles H. Potter, 39 ECAB 645 (1988); Warren Guidry, 39 ECAB 1421 (1988).

The Board found that appellant had no more than a 43 percent binaural hearing loss for which he received a schedule award. An Office medical adviser properly applied the Office's standards to the results of audiometric testing obtained by the Office referral physician. Benjamin Swain, 39 ECAB 448 (1988).

Appellant filed a claim alleging he had sustained an additional hearing loss due to occupational noise exposure over the 18 percent binaural hearing loss for which he had received a schedule award. The Board found that the medical evidence established that appellant had no more than an 18 percent binaural hearing loss for which he had received a schedule award. Henry Moreno, 39 ECAB 475 (1988).

The Board found that appellant had no more than a 15 percent monaural hearing loss of the right ear for which he received a schedule award. The Board noted that due to a mathematical error in applying the Office's standardized procedure for calculating appellant's hearing loss, appellant received a larger schedule award than the 11 percent monaural hearing loss demonstrated by the audiometric testing he underwent. Charles H. Potter, 39 ECAB 645 (1988).

The Board found that appellant had no more than a 38 percent binaural hearing loss for which he received a schedule award. Warren Guidry, 39 ECAB 1421 (1988).

LEG

The Board found that appellant was entitled to a schedule award for a 14 percent impairment of the right leg. The Board reviewed the calculations of an Office medical adviser which applied the A.M.A. *Guides* to each toe; however, it was noted that the medical adviser erroneously applied the combined values chart in calculating the impairment of the foot contributed by each toe. The schedule award determination was affirmed, as amended. Louis L. Jackson, Sr., 39 ECAB 1158 (1988).

Appellant sustained injury to his right knee and was diagnosed as having sustained a torn medial meniscus. The Office rejected appellant's claim for a schedule award finding that the medical evidence did not establish that appellant had any permanent impairment of the right leg. The Board found that the Office medical advisers who had reviewed the case file did not provide sufficient reason for their opinions that the medical reports from appellant's physician did not satisfy the criteria for a 20 percent anterior cruciate ligament loss under Table 39 of the A.M.A. *Guides*. The Board noted that the medical advisers incorrectly concluded that Table 38 of the A.M.A. *Guides* provided permanent impairment values only for a total meniscectomy. The *Guides* do not specify that the meniscectomy must be a total meniscectomy for determination of impairment of the member. The case was remanded to the Office for further development of the medical evidence to determine whether there was loss of shock absorption due to the meniscectomy and the extent of anterior cruciate ligament loss. Charles D. Haws, 39 ECAB 1409 (1988).

LUNG

The Board found that appellant, a sandblaster, had no more than a 30 percent loss of use of both of his lungs due to asbestos exposure in his federal employment. The Office properly based appellant's schedule award on the extent of respiratory impairment determined under the A.M.A. *Guides* after reviewing the pulmonary function studies obtained by an Office referral physician. James C. Hall, Sr., 39 ECAB 342 (1988).

The Board found that there was a conflict in medical opinion as to whether appellant had any permanent impairment of the lungs due to exposure to asbestos in his federal employment. Appellant underwent two pulmonay function studies by separate physicians. One study indicated that appellant had a Class One (zero percent) impairment while the other study indicated a Class Two (10–25 percent) impairment. The case was remanded to the Office for referral of appellant to an impartial medical specialist. Raymond D.K. Lau, 39 ECAB 1103 (1988).

The Board found a conflict in medical opinion as to the nature and extent of appellant's respiratory impairment in light of his history of asbestos exposure and cigarette smoking. Appellant's attending physician and an Office referral physician both conducted pulmonary function studies which revealed a Class Two impairment; however, appellant's physician attributed this finding to appellant's history of asbestos exposure while the Office referral physician noted the impairment was "most likely related to his smoking." The Board noted that if at least part of appellant's respiratory impairment was due to his employment-related asbestos exposure, appellant would be entitled to a schedule award for the entire amount of the respiratory impairment. The case was remanded for referral of appellant to an impartial medical specialist. Garnett J. Rodgers, 39 ECAB 1209 (1988).

MAXIMUM MEDICAL IMPROVEMENT

The period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of his or her employment injury. Maximum improvement means that the physicial condition of the injured member of the body has stabilized and will not improve further. A schedule award is appropriate where the physical condition of an injured member has stabilized despite the possibility of an eventual change in the degree of functional impairment of the member. Neil Papkin, 39 ECAB 239 (1987); James C. Hall, Sr., 39 ECAB 342 (1988).

Appellant, a letter carrier, twisted his right ankle when he fell on a driveway while in the performance of duty. The Board found that the Office properly determined that appellant had no more than a 14 percent impairment of his right lower extremity as an Office medical adviser had properly applied the A.M.A. *Guides* to the report of appellant's attending physician. Appellant's physician had advised that his 40 percent estimate of permanent impairment was based on such factors as possible future post-traumatic changes to the leg. A schedule award cannot be made on the basis of a possibility that the extent of impairment will increase in the future. Neil Papkin, 39 ECAB 239 (1987).

NONSCHEDULE DISABILITY

A schedule award is not payable for the loss or loss of use of a part of the body of function not specifically enumerated in section 8107 of the Act or its implementing regulations. This principle applies equally to members of the body which were not enumerated in the schedule provision of the Act as it read before 1974 and the organs which were not enumerated in the regulations promulgated pursuant to the 1974 amendments. Mark A. Wages, 39 ECAB 282 (1987); Carlos E. Martinez, 39 ECAB 821 (1988); James E. Jenkins, 39 ECAB 860 (1988).

Appellant was not entitled to a schedule award for a claimed brain disorder as the brain is a portion of the body which is not listed in the schedule provisions of the Act or in the regulations. Carlos E. Martinez, 39 ECAB 821 (1988).

Appellant was not entitled to a schedule award for his back as the back is specifically excluded from the definition or "organ" under the Act. James E. Jenkins, 39 ECAB 860 (1988).

PAIN AND WEAKNESS

The Board found that an Office medical adviser was in error in assigning a 10 percent impairment for appellant's subjective complaints of pain. The case was returned to the Office to properly calculate appellant's left upper extremity impairment in conformance with the A.M.A. *Guides*, including application of Chapter Two of the *Guides* in determining the extent of impairment due to pain, discomfort, or loss of sensation. Richard W. Robinson, 39 ECAB 484 (1988).

PROOF REQUIRED

The Office properly denied appellant's claim for a schedule award. Appellant failed to provide a physician's report which contained a complete and detailed description of the impairment of his upper left extremity such that, utilizing the A.M.A. *Guides*, an impairment rating could be determined by the Office. James E. Jenkins, 39 ECAB 860 (1988).

SCARRING

Chapter 11 of the A.M.A. *Guides*, The Skin, provides that where scarring results in permanent impairment the specific nature of the impairment must be identified and the criteria of the appropriate chapter of the *Guides* applied. Kenneth Nichols, 39 ECAB 843 (1988).

TINNITUS

The A.M.A. *Guides* allow for an award for tinnitus under disturbances of vestibular function. Such disturbances must be demonstrated in the medical evidence and documented by objective findings of dysequilibrium or evidence that the employee cannot perform his or her usual activities of daily living. Charles H. Potter, 39 ECAB 645 (1988).

Appellant did not demonstrate that his tinnitus caused or contributed to a ratable hearing loss other than that for which he had been compensated, and he did not establish that his tinnitus caused vestibular function disturbances or a loss of wage-earning capacity. Charles H. Potter, 39 ECAB 645 (1988).

SUBROGATION

THIRD PARTY RECOVERY (SECTION 8132)

Section 8132 of the FECA provides that an employee who sustains injury for which compensation is payable under circumstances which create legal liability in a party other than the United States has the obligation to reimburse to the United States the amount of compensation paid once a recovery is made against the responsible tortfeasor. The purpose underlying this obligation is to prevent a double recovery by the employee. Charles E. Davis, 39 ECAB 322 (1987).

Section 8132 does not authorize recovery of continuation of pay received by a claimant in third party situations. Charles E. Davis, 39 ECAB 322 (1987).

The Board did not approve the third party recovery calculations of record as the Office sought to recover as compensation disbursements which were made to appellant as continuation of pay. The case was remanded to the Office for recomputation of the government's third party credit. Charles E. Davis, 39 ECAB 322 (1987).

TERMINATION OF COMPENSATION

OFFICE

The Office terminated appellant's compensation benefits based on the fact that he had been working while receiving temporary total disability compensation. The Act does not provide that compensation can be terminated under such circumstances. The Office should have developed the record further to determine whether appellant's disability due to the employment injury had ceased or whether appellant had a loss of wage-earning capacity based on his actual earnings. William C. Austin, 39 ECAB 357 (1988).

The Board found that the Office did not meet its burden of proof to establish that appellant's employment-related disability had ceased. The designated impartial medical specialist opined that the employment injury resulted in a simple bruise to appellant's knee and arm which would normally resolve in three to six weeks. The physician's report failed to address appellant's conditions of thrombophlebitis, Baker's cyst, patellectomy and a 35 percent permanent partial loss of use of the left leg which had been accepted by the Office as causally related to the employment injury. Pauline Brown, 39 ECAB 578 (1988).

REFUSAL OF SUITABLE WORK

Section 8106(c)(2) of the FECA provides that the Office may terminate the compensation benefits of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee. Donald M. Parker, 39 ECAB 289 (1987).

Appellant, a former warehouseman, declined a supply clerk position offered by the employing agency which was within the physical restrictions recommended by the physicians of record and which the Office determined was suitable. Appellant declined the position for the stated reason that it would be more financially advantageous to retain civil service disability retirement benefits and obtain a private sector job. The Board held that the Office properly terminated appellant's compensation for refusal to accept suitable work and found that appellant's stated reason for declining the position was not reasonable. Donald M. Parker, 39 ECAB 289 (1987).

The Board found that the Office improperly determined that appellant was not entitled to monetary compensation on the ground that he refused to accept a valid job offer. Appellant had lived in Indiana, Pennsylvania and submitted letters to the Office stating that a move to Oklahoma City, Oklahoma, the location of the employing establishment's job offer, was financially prohibitive. Appellant moved from

Pennsylvania to San Antonio, Texas; but noted that his move was made affordable only through the generosity of his family in contributing to the actual moving costs. The Board noted that the evidence did not demonstrate that appellant's family would have contributed to appellant's move to Oklahoma. The Board noted that the "cost of relocation" necessarily includes the cost of finding affordable housing in a new area and not merely the actual cost of moving. The Board found that the evidence of record demonstrated that a relocation by appellant from Pennsylvania to Oklahoma was financially prohibitive and that appellant reasonably refused the employing establishment's job offer. Ricardo G. Contreras, 39 ECAB 777 (1988).

TIME LIMITATIONS

INCOMPETENCE

It is the employee's burden to show that he or she was incompetent for the period from the date of injury, or since time began to run, by submitting medical evidence stating that the employee's mental condition was such that the employee was not capable of filling out a form or otherwise capable of furnishing the relatively simple information necessary for filing a claim and satisfying the limitation requirements. Paul S. Devlin, 39 ECAB 715 (1988).

The employee filed a traumatic injury claim for an emotional condition which he related to a head injury at work six years earlier. The Board found that the claim was barred by the applicable time limitation provisions of the Act because the time for giving notice of injury and for filing a claim began to run at the time of the traumatic head injury, despite appellant's claim that he was not aware of the seriousness or of the ultimate consequences of the injury. The medical evidence did not establish that appellant's failure to file a claim was due to incompetency. Paul S. Devlin, 39 ECAB 715 (1988).

MANDATORY LIMITATIONS

Appellant, a former enrollee of the Civilian Conservation Corps, filed a claim alleging injury on March 21, 1937 when a pressure cooker exploded. Appellant's claim was governed by the provisions of the FECA of June 28, 1937 which extended the benefits of the Act of February 15, 1934 to enrollees of the Civilian Conservation Corps. The applicable provisions provided that unless notice of injury was filed within one year after the injury, no compensation would be allowed unless the immediate supervisor had actual knowledge of the injury. Orlando R. Santistevan, 39 ECAB 199 (1987).

The Board found that the maximum time limit applicable to this case was one year and that the evidence of record established that appellant did not file a claim for compensation with the Office until more than 48 years after his injury. Appellant's claim was not timely filed. Orlando R. Santistevan, 39 ECAB 199 (1987).

PRE-1974, ONE-YEAR/FIVE-YEAR

The FECA requires in cases of occupational disease prior to September 7, 1974 that a claim be filed within one year of the date that the claimant is aware, or reasonably should have been aware, that his condition may have been caused by factors of his federal employment. The requirement may be waived if the claim is filed within five years and (1) it is found that such failure was due to circumstances beyond the control of the person claiming benefits; or (2) that such person has shown sufficient cause or reason in explanation thereof and material prejudice to the interest of the United States has not resulted from such failure. Salvatore Previte, 39 ECAB 316 (1987).

The Board found that appellant's claim for an occupational hearing loss was timely filed. The evidence established that appellant did not work with equipment that was deemed hazardous for hearing; he was under the impression that ear-protectors were issued as a safety precaution against dust and sparks; and, although aware of a gradual hearing loss, he noted that he was not told of the results of hearing tests given by the employing establishment. The case was remanded to the Office for further development on the merits of appellant's claim. Salvatore Previte, 39 ECAB 316 (1987).

Section 8122 of the Act provides, in cases of disease prior to September 7, 1974, that a claim for compensation be filed within one year of the date the claimant was aware, or reasonably should have been aware, that the disabling condition may have been caused by factors of his or her employment. Jack Johnson, 39 ECAB 1021 (1988); Maxine Leonard (Ardee Leonard), 39 ECAB 1180 (1988).

The requirement imposed by Section 8122 may be waived if the claim is filed within five years and (1) it is found that such failure was due to circumstances beyond the control of the person claiming benefits or (2) that such person has shown sufficient cause or reason in explanation thereof and material prejudice to the interest of the United States has not resulted from such failure. The test for whether sufficient cause or reason was shown to justify waiver of the one year time limitation is whether a claimant prosecuted the claim with that degree of diligence which an ordinary prudent person would have exercised in protecting his or her rights under the same or similar circumstances. Maxine Leonard (Ardee Leonard), 39 ECAB 1180 (1988).

Appellant filed a claim on August 4, 1981 alleging that her husband's death on July 22, 1980 was due to asbestos exposure during his federal employment at Naval Shipyards from 1941 to 1944. As the employee's last exposure to asbestos, therefore his injury, occurred during 1944, the claim was subject to the one year time limitation provisions effective prior to September 7, 1974. Appellant admitted that she was aware as early as 1976 of the employee's asbestosis and that by the time of his death she had discussed his federal employment exposure with the employee's physician. She alleged that the one year requirement did not preclude her claim as a 1985 physician's report was the first instance of a medical opinion linking the employee's death to asbestos exposure. The Board noted this argument was without merit as the statute of limitations begins to run on the date that the appellant actually knows of the "possible relationship" between the employee's death and his employment or reasonably should have known of such possible relationship. The Board has never required that appellant have definitive evidence of causal relationship on the date the claim is filed. Appellant did not provide sufficient cause to justify waiver of the one-year time limitation. Maxine Leonard (Ardee Leonard), 39 ECAB 1180 (1988).

THREE-YEAR TIME LIMITATION

Section 8122 of the FECA provides that an original claim for compensation for disability or death must be filed within three years after the injury or death unless (1) the immediate superior had actual knowledge of the injury within 30 days. In a case of latent disability, the time for filing a claim does not begin to run until the employee has a compensable disability and is aware, or by exercise of reasonable diligence should have been aware, of the causal relationship of the compensable disability to his employment. The time limitations do not run against an incompetent individual while he or she is incompetent and has no duly appointed legal representative, or against any individual whose failure to comply is excused by the Secretary on the ground that such notice could not be given because of exceptional circumstances. Paul S. Devlin, 39 ECAB 715 (1988).

WHEN TIME BEGINS TO RUN

DISEASE OR LATENT CONDITION

Appellant's claim for an emotional condition was not barred by the three-year time limitation provision of the Act. The last employment incident to which appellant attributed his emotional condition was an assignment to a trip at sea which included being in a submarine. This incident took place within three years of appellant's filing his claim for compensation. The receipt of an assignment that would include being at sea and submerged in a submarine was an incident sufficient to constitute a factor of employment which triggered appellant's anxiety and phobic reaction. Richard J. Kenny, 39 ECAB 649 (1988).

In a case of latent disability, the time for filing a claim does not begin to run until the employee has a compensable disability and is aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship of the compensable disability to his or her employment. Paul S. Devlin, 39 ECAB 715 (1988).

In July, 1986, appellant filed a claim alleging lung disease causally related to his exposure to asbestos during his federal employment. Appellant retired in November, 1959. A majority of the Board found that appellant's claim was timely filed as the evidence established that appellant was not aware of the relationship between his exposure to asbestos during his federal employment and his lung condition until a visit to his physician in June, 1986. Jack Johnson, 39 ECAB 1021 (1988).

Appellant's claim for benefits was based upon her assertion that her husband's death was a result of occupational disease sustained in the performance of duty. The statutory period for filing a claim in such a case begins to run when the surviving beneficiary is, or should have been, aware of the causal relationship between the employee's death and factors of his federal employment. Maxine Leonard (Ardee Leonard), 39 ECAB 1180 (1988).

TRAUMATIC INJURY

When an employee sustains a traumatic injury, the time for giving notice of injury and filing a claim for compensation begins to run at the time of the traumatic incident, despite the employee's claim that he or she was not aware of the seriousness or the ultimate consequences of the injury, or that the nature of the injury was not diagnosed until sometime later. Paul S. Devlin, 39 ECAB 715 (1988).

VOCATIONAL REHABILITATION

Section 8104 of the FECA provides that a permanently disabled employee whose disability is compensable under the Act may be directed to undergo vocational rehabilitation. This section vests the Office with discretionary powers and the Office's decision involving the exercise of this discretion will not be disturbed by the Board unless it is clearly in error. Edward E. Johnson, 39 ECAB 611 (1988); Richard T. DeVito, 39 ECAB 668 (1988).

The Board found that the Office did not abuse its discretion when it denied approval of a vocational rehabiliation plan proposed by appellant and denied payment of a maintenance allowance. The vocational rehabilitation plan proposed by appellant failed to specify the duties of the positions of teacher, social service worker or adminstrative assistant, did not discuss whether appellant was qualified for these positions, and did not indicate whether these positions were reasonably available within appellant's commuting area. The maintenance allowance was intended to cover appellant's expenses in searching for the jobs listed in his proposed vocational rehabilitation plan. Edward E. Johnson, 39 ECAB 611 (1988).

To be eligible for rehabilitation benefits there must be a showing that there has been an impairment in an employee's wage-earning capacity. The purpose of providing training under the Act is to upgrade the skills or education of beneficiaries who cannot return to their former federal employment in order that they may qualify for other suitable employment and restore lost earning capacity. Richard T. DeVito, 39 ECAB 668 (1988).

The medical evidence of record established that appellant had sustained a temporary aggravation of his chronic hepatitis and allergic rhinitis conditions caused by exposure in his federal employment to jet fumes. As there was no evidence that appellant sustained any permanent physicial impairment or had any employment-related loss of wage-earning capacity, the Office properly denied appellant's application for vocational rehabilitation benefits. Richard T. DeVito, 39 ECAB 668 (1988).

WAGE-EARNING CAPACITY

ACTUAL EARNINGS

Section 8115(a) of the FECA provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by actual earnings if such actual earnings fairly and reasonably represent the employee's wage-earning capacity. If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, or the employee does not have any actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualification for other employment, the availability of suitable employment and other circumstances which may affect the employee's wage-earning capacity in his or her disabled condition. Pope D. Cox, 39 ECAB 143 (1988); Clifford C. Larson, 39 ECAB 554 (1987); Daycon C. Hogue, 39 ECAB 1162 (1988).

In *Vernon Booth,* 7 ECAB 209 (1954), the Board held that income from business profits are not generally held to be the fruits of wage-earning capacity but of investment. A return on investment cannot be considered as if it were wages. If the source of the income can be differentiated as representing either profit or the product of the employee's work, any portion of the income directly traceable to such work may be considered as if it were wages and can be used in determining a wage-earning capacity if they fairly and reasonably represent the injured employee's wage-earning capacity. Pope D. Cox, 39 ECAB 143 (1987).

The Board found that the evidence of record was insufficient to differentiate appellant's income between business profits and the product of his work. Appellant, a former drill operator, owned a corporation engaged in buying oil and gas leases and hiring drill crews to work on the wells. The testimony presented at a hearing before an Office hearing representative was unclear as to whether appellant or his son performed the actual duties of managing the corporation, selecting the drill sites, and hiring drill crews and was further unclear as to whether the income appellant received was the result of his management of the corporation or represented a return on the investment he made in drilling leases. The case was remanded to the Office for a proper determination of appellant's loss of wage-earning capacity. Pope D. Cox, 39 ECAB 143 (1987).

The Board found that the Office improperly determined appellant's loss of wage-earning capacity because it based its determination on what a person working as a tax attorney would have received if such person had worked the same hours that appellant had allegedly worked. The Office apparently determined that appellant's actual earnings did not fairly and reasonably represent his wage-earning capacity; however, it failed to determine appellant's wage-earning capacity with due regard to his injury and physical impairment, his usual employment, age, qualifications, and the availablity of suitable employment. The Office's determination of appellant's wage-earning capacity for the period beginning July 19, 1979 was erroneous. Clifford C. Larson, 39 ECAB 554 (1988).

The Office improperly determined appellant's loss of wage-earning capacity. Following the employment injury, appellant returned to work as a clerk-typist, the position offered to him by the employing establishment; however, appellant stopped working in this capacity prior to the Office's loss of wage-earning rating. Since appellant ceased working as a clerk-typist, the Office should have followed its established procedures for determining appellant's loss of wage-earning capacity as he was not actually performing the job when the rating was accomplished. Daycon C. Hogue, 39 ECAB 1162 (1988).

The Office improperly determined appellant's loss of wage-earning capacity based on his actual commissions earned from real estate sales. Appellant was disabled due to an employment-related back condition and undertook his own rehabilitation by studying real estate. Appellant advised the Office of his part-time employment and the Office calculated appellant's wage-earning capacity based on his actual earned commissions. The Office determined that the actual commissions earned were not significant enough to reduce his compensation benefits significantly and did not adjust his compensation. During the next six years appellant reported his commissions, which totaled over $26,000.00, to the Office and it determined his wage-earning capacity by totalling all commissions earned and dividing this sum by the number of calendar days from the date appellant first earned a commission to the last day he earned a commission. The Board found that the Office disregarded periods during which appellant worked without earning any commission and did not apply its established procedures or Board precedent for determining wage-earning capacity where wages are based on commissions. Based on these errors, the Board reversed the Office's determination that an overpayment of compensation had been created. Victoriano P Chavez, 39 ECAB 1223 (1988).

AGE

The vocational rehabilitation counselor frequently mentioned in his reports that appellant's age was a barrier to finding employment in the selected position of part-time security guard. Section 8115 of the Act requires the Office to consider appellant's age in determining his wage-earning capacity. There was no indication from the record that the Office determined the extent to which appellant's age may make him an unsuitable employment candidate for the security guard position. Harvey Jacobs, Jr., 39 ECAB 1439 (1988).

COMPUTATION OF (SEE COMPUTATION OF PAY)

The Office ascertained the wages of the position which was selected as representative of appellant's wage-earning capacity, and compared these wages to the current pay rate of the position appellant held when injured. As the wages of the selected position were greater, the Office properly found that appellant had no loss of wage-earning capacity. Ralph W. Baker, 39 ECAB 1413 (1988).

In *Irwin Goodman*, 23 ECAB 6 (1971), the Board held that earnings from a part-time job in private industry may not be considered in determining a claimant's wage-earning capacity since such earnings could not be considered in determining the employee's payrate. In this case, appellant's private employment as a janitorial supervisor was not similar to his position as a motor vehicle operator in federal employment. Therefore his earnings as a janitorial supervisor could not be combined with his earnings in federal employment to determine his rate of pay for compensation purposes even if they had increased after the injury. The Board found that the Office did not properly determine appellant's loss of wage-earning capacity. As a result, the Office's calculation of an overpayment based on loss of wage-earning capacity was also erroneous. James Jones, Jr., 39 ECAB 678 (1988).

DEFINITIONS

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injury and degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications, and the availability of suitable employment. When the Office makes a medical determination of partial disability and of the specific work restrictions, the claimant's case should be referred to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market, which fits the employee's capabilities in light of his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity. Hattie Drummond, 39 ECAB 904 (1988).

A reduction in benefits for partial disability is accomplished under section 8115 of the FECA by the determination of an appellant's wage-earning capacity. In determining compensation for partial disability, the wage-earning capacity of an employee is determined with due regard to (1) the nature of the employee's injury; (2) the degree of physical impairment: and a consideration of other specified factors or circumstances which may affect his or her wage earning capacity. Anthony Pestana, 39 ECAB 980 (1988).

EDUCATION AND EXPERIENCE

Under section 8115 of the Act, the Office is required to give due regard to an employee's "qualifications" for other employment. In determining an employee's wage-earning capacity, this necessitates consideration by the Office of the educational background of the employee. Lucius E. Pearson, 39 ECAB 1244 (1988).

The Office did not follow its established procedures in determining that appellant had the wage-earning capacity of a Cashier II. The Office did not take into consideration whether appellant's third-grade education made him a suitable candidate for the selected position. Although the selected position did not provide any indication that any minimal educational background or specialized work experience was required, given appellant's limited schooling further investigation was required as to whether he could perform the duties as described in the position description. The case was remanded to the Office for consideration of appellant's educational background in accordance with section 8115 of the Act. Lucius E. Pearson, 39 ECAB 1244 (1988).

EVIDENCE REQUIRED

If the medical evidence establishes that residuals of an employment-related impairment are such that, from a medical standpoint, they prevent the employee from continuing in the employment, the employee is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity. James Bain, Jr., 39 ECAB 455 (1988).

The Board found that the medical evidence of record was insufficient to permit an informed adjudication of the question of whether appellant's employment injury resulted in a temporary aggravation of an underlying condition with no resulting permanent residuals, or whether the employment injury caused a new condition or interacted with an underlying condition with resulting permanent residuals. The case was remanded to the Office for further development. James Bain, Jr., 39 ECAB 455 (1988).

In determining the employee's loss of wage-earning capacity, the Office must take the following steps: (1) ensure that the record contains a detailed current description of the employee's ability to perform work in a disabled condition, including capacity to lift, stand, walk, etc.; (2) ensure that the record contains a complete description of all the duties of the offered position, and all its physical requirements; and (3) ensure that the work offered to the claimant is consistent with the work capacity described in the medical report. If there is any question about the compatibility, the case must be referred to the Office medical adviser or the attending physician. Anthony Pestana, 39 ECAB 980 (1988).

The Office failed to ensure that the record contained a detailed current description of appellant's disabled condition and ability to perform work. The Office made its loss of wage-earning determination approximately five years after appellant's most recent medical examination. Anthony Pestana, 39 ECAB 980 (1988).

Modification

Once the wage-earning capacity of an injured employee is properly determined, it remains undisturbed regardless of actual earnings or lack of earnings. A modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was in fact erroneous. This burden is on the Office to establish that there has been a change so as to affect the employee's capacity to earn wages in the job determined to represent his or her earning capacity. Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost. Lawrence M. Nelson, 39 ECAB 788 (1988).

The Office made a new loss of wage-earning capacity determination based on an increase in appellant's earnings. Following his employment-injury appellant could not return to his job as a criminal investigator and the Office used the actual position appellant was holding as a plant guard when it originally determined his loss of wage-earning capacity. Subsequently appellant received salary increases in his plant guard position and made a transfer to a chemical technician position to avoid a layoff. Based on additional pay increases appellant received as a chemical technician, the Office redetermined appellant's wage-earning capacity. The Board reversed the Office on the basis that the record did not contain sufficient information to determine whether appellant had been retrained or otherwise rehabilitated so as to permit the use of the chemical technician position in redetermining appellant's wage-earning capacity. The record indicated that as a chemical technician, appellant was still in the same pay grade as a guard and had made a lateral transfer to the position of chemical technician. There was no showing by the Office that additional qualifications had been obtained by appellant through retraining. Lawrence M. Nelson, 39 ECAB 788 (1988).

Odd-lot rule

The Director of the Office conceded at oral argument before the Board that the Office had improperly determined that the deceased employee had a 25 percent loss of wage-earning capacity. The record established that the Office failed to consider the reasonable availability of the selected position within the employee's commuting area and in the open labor market, factors the Office must consider when it bases its determination on an employee's "capacity to earn wages" rather than on actual earnings. Instead, the Office based its wage-earning decision on the employee's "capacity to earn wages" at a single light-duty 30 hour per week position at the employing establishment. In determining an employee's wage-earning capacity the

Office may not select a makeshift or odd-lot position or one not reasonably available on the open labor market. Steven M. Gourley (Louise E. Gourley), 39 ECAB 413 (1988).

The Office based its loss of wage-earning capacity determination on the basis that the increase in earnings appellant received in his part-time job as a janitorial supervisor after his employment injury fairly and reasonably represented his wage-earning capacity. The Board noted, however, that the evidence of record from a vocational consultant revealed that appellant did not have the physical or vocational ability to perform the position of a janitorial supervisor and that he performed duties of a makeshift or odd-lot nature. Therefore, the earnings appellant derived from his part-time employment did not fairly or reasonably represent his wage-earning capacity and could not be considered in determining appellant's pay rate. As a result, the Office's calculation of an overpayment based on its loss of wage-earning capacity determination was also found erroneous. James Jones, Jr., 39 ECAB 678 (1988).

PHYSICAL REQUIREMENTS

The Office met its burden of proof of establishing that appellant had no loss of wage-earning capacity and therefore was not disabled within the meaning of the Act. The physical requirements of the selected position of small business manager/contractor (construction) did not exceed the work tolerance limitations set forth by the Office's referral physician, and there was no medical evidence that appellant was unable to perform the physical requirements of the position. The evidence established that appellant had the experience required for the position and that the position was reasonably available in appellant's commuting area. Ralph W. Baker, 39 ECAB 1413 (1988).

The Board found that the Office did not meet its burden of proof in establishing that the position of part-time security guard represented appellant's wage-earning capacity. An Office medical adviser expressed reservations about appellant's physical ability to perform all duties of a security guard due to his employment related left knee condition, particularly apprehending or expelling miscreants. The Office should have further developed the record to determine whether the physical requirements for the job are applicable to all duties as listed on the job description or whether the possibility exists that the physical demands for the job may be greater for certain duties. The Office should have then requested appellant's physician to review the position description and physical requirements and provide an opinion on whether appellant was capable of performing such duties. Harvey Jacobs, Jr., 39 ECAB 1439 (1988).

PREEXISTING IMPAIRMENTS

In determining loss of wage-earning capacity, physical impairments which preexisted the accepted condition must be taken into consideration when selecting a job for purposes of determining wage-earning capacity. The case was remanded to the Office for further development to determine whether appellant's hypertension and retinopathy conditions preexisted the employment injury and for a determination on whether appellant's coronary condition and loss of sight were the result of the natural progression of any preexisting condition. Pope D. Cox, 39 ECAB 143 (1987).

REASONABLE AVAILABILITY.

The Director of the Office conceded at oral agrument before the Board that the Office had improperly determined that the deceased employee had a 25 percent loss of wage-earning capacity. The record established that the Office failed to consider the reasonable availability of the selected position within the employee's commuting area and in the open labor market, factors the Office must consider when it bases its determination on an employee's "capacity to earn wages" rather than on actual earnings. Instead, the Office based its wage-earning decision on the employee's "capacity to earn wages" at a single light-duty 30 hour per week position at the employing establishment. In determining an employee's wage-earning capacity the Office may not select a makeshift or odd-lot position or one not reasonably available on the open labor market. The case was remanded to the Office for further development. Steven M. Gourley (Louise E. Gourley), 39 ECAB 413 (1988).

Although a vocational rehabilitation counselor advised the Office that part-time security guard positions were reasonably available in appellant's commuting area, this statement was contradicted by his progress reports which frequently indicated that appellant's requirement of part-time work was problematic. Given this contradiction, the Office should have requested that the counselor provide clarification on the reasonable availability of part-time security guard positions within appellant's commuting area. Harvey Jacobs, Jr., 39 ECAB 1439 (1988).

VOCATIONAL REHABILITATION

Section 8113(b) of the FECA provides that if an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under section 8104 of the Act, the Office, on review under section 8128 of the Act and after finding that in the absence of the failure the wage-earning capacity of the individual would probably have substantially increased, may reduce prospectively the monetary compensation of the individual in accordance with what would probably have been his or her wage-earning capacity in the absence of the failure, until the individual in good faith complies the direction of the Office. Hattie Drummond, 39 ECAB 904 (1988).

Appellant, a letter carrier, injured her back in the performance of duty. The Office referred appellant to a private rehabilitation specialist who indicated that although appellant held a cosmetologist's license, such positions were difficult to find in the job market and that appellant would need further training to qualify as a barber. The Office agreed to sponsor appellant's attendance at a local barber school; however, appellant refused to attend in preference to continue part-time custodial work. The Office determined appellant's wage-earning capacity based on the position of barber instead of that as a custodial worker. The Board affirmed the decision of the Office, noting that appellant's wage-earning capacity would have increased if she had participated in the vocational rehabilitation program. Hattie Drummond, 39 ECAB 904 (1988).

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Decisions of the Employees' Compensation Appeals Board

U.S. Department of Labor
Ann D. McLaughlin, Secretary

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October 1, 1987 - September 30, 1988

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[1] Docket numbers are assigned on a fiscal year basis. Thus 88-1 was the first case filed in fiscal year 1988, which commenced on October 1, 1987.

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In the Matter of ROBERT J. CHOATE *and* DEPARTMENT OF THE NAVY, CIVILIAN PERSONNEL OFFICE, New Orleans, La.

Docket No. 87-1548; Submitted on the Record;
Issued October 8, 1987

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether appellant's injury on March 10, 1987 was sustained in the performance of duty.

On March 17, 1987 appellant, then a 43-year-old communications equipment operator, filed a claim alleging injury to his back causing a fractured vertebra when he fell at work on March 10, 1987. The cause of the injury was described as follows: "Employee was working at three teletype terminals and the next thing he knew he woke up on the floor. [He] possibly hit [a] utility table [but was] not sure about fall—only know[s] what witness says." A co-worker, Henry Washington, described the incident as follows on appellant's CA-1 claim form: "I heard a noise as if someone had fallen over a piece of equipment and/or chair where the teletype is located. I went over and saw [appellant] laying [sic] on the floor face-up the supervisor was trying to communicate with [appellant] but [appellant] was oblivious to what was happening. It seemed to me as if [appellant] had some type of seizure but within 5-10 minutes he had recovered and was standing on his own." Appellant explained that the delay in filing his claim was because "neither I nor [my] supervisor knew I was supposed to fill out form."

In a March 25, 1987 letter accompanying the claim the employing establishment reiterated appellant's description of the incident and noted that he did not seek immediate medical attention. The letter stated that appellant revealed that "his back is broke[n]" and that he wanted authorization for a back brace. The employing establishment advised appellant that until the Office of Workers' Compensation Programs had his claim and all supporting medical documentation to make a decision, the brace would be appellant's responsibility. The employing establishment also noted that appellant would be on sick leave until a decision was reached and that they "[could] not determine why he passed out without medical documentation nor [could they] determine if he actually hit an intervening object before he hit the floor."

By letter dated April 9, 1987 the Office requested that appellant submit medical evidence in support of his claim which included a history of injury, examination results, diagnosis and treatment, and opinion, supported by medical rationale, as to the causal relationship between disability and the injury as reported.

By letter dated April 15, 1987 the Office requested that appellant provide a detailed history of his injury with any available witness statements on the incident. The Office also requested that appellant address the cause of his fall and whether he had ever fallen or fainted before either at or away from the workplace.

In an April 3, 1987 letter to the employing establishment Dr. Carl F. Culicchia, M.D., a Board-certified neurological surgeon, reported the following history of injury:

> "Apparently about two weeks ago, while at work, the patient suddenly lost consciousness and fell. He states that he struck his back against the computer table. He states that he has no knowledge of the incident, stating that he found himself on the floor after he regained consciousness and contact with his surroundings. When questioned, the patient reports that he was told that he had a 'seizure'. He does not know any details. Specific questioning reveals that he did not lose sphincter control, but apparently he did bite the inside of his mouth."

Dr. Culicchia noted appellant had served in Vietnam and had sustained a head injury, from which he was unconscious "all night", and an associated fractured mandible. Appellant had also been exposed to "Agent Orange" and had a rash on his legs. Appellant related that he had never had a seizure before. Dr. Culicchia also noted that appellant commonly drinks a half pint of vodka a day upon leaving work, that he doesn't drink every day, but at least two to three times a week. Dr. Culicchia remarked that appellant had stopped drinking two days before his seizure. Dr. Culicchia reported that his examination of appellant revealed no abnormalities except for mid-thoracic pain from a compression fracture of the T-6 vertebra which did not include injury to the spinal cord. Dr. Culicchia's impression was that appellant had suffered a generalized convulsion of unclear etiology, and that as a result of the seizure experience sustained a T-6 compression fracture. Dr. Culicchia prescribed anti-seizure medication for appellant and ordered an electroencephalogram (EEG) and a computerized axial tomography (CAT) brain scan. An April 4, 1987 CAT scan was normal and a CAT thoracic spine scan documented the T-6 compression fracture.

In an April 10, 1987 follow-up letter to the employing establishment Dr. Culicchia reported a normal EEG, reiterated the normal CAT scan and neurologic examination, and opined that, considering appellant's history of a brief period of withdrawal from alcohol, at which time he experienced a seizure, "it is reasonable to suggest that [appellant's] seizure is related to alcoholic encephalopathy associated with a point in time of withdrawal from alcohol."

On a questionnaire dated April 1, 1987, received by the Office May 4, 1987, appellant answered that he had no history of seizures, that "numbness" was the only immediate effect, and that he was able to return to work following his seizure. He stated that he was unaware of the fracture as pain did not set in for several days and so he just took aspirin, but as he began to physically deteriorate, pain set in and became overbearing. He also noted: "I apparently tripped over a rolling chair, falling on equipment, fracturing my spine, causing short-term memory loss." He continued that "since neurological tests prove no abnormality, I maintain that the seizure was a result of the injury."

In an April 22, 1987 letter to the employing establishment Dr. Frank Schiavi, Jr., a Board-certified orthopedic surgeon, reported that he had examined appellant initially on March 19, 1987 and again on March 26 and April 9, 1987, and had noted that x-rays revealed a wedge compression fracture of T-7. Dr. Schiavi prescribed pain medication and a brace, and referred appellant to Dr. Culicchia for a neurological consultation relative to the cause of his fall. Dr. Schiavi noted that "people nearby had told [appellant] that he struck his back on a table."

In a witness statement received by the Office on May 4, 1987 Gary J. Percle, appellant's supervisor, noted that on March 10, 1987 as appellant:

> "Was processing readdressal messages on teletype units 2 and 5. I was sitting at my desk about 25 feet away from Mr. Choate when I heard a noise in his work area. Initial investigation revealed Mr. Choate laying on his left side with his knees about half way to his chest in a state of convulsion. He was lying between teletype units 2 and 3. The table between units 2 and 3 was on its side in front of teletype unit 3. I tried to communicate with him but got no response. At that time I informed Mr. Washington to notify security for help. When Mr. Washington returned, Mr. Choate was on his back in a state of confusion not knowing what had happened. I told him that he apparently had a seizure and that an ambulance was on its way. By the

> time security arrived with the ambulance, Mr. Choate had recovered from his seizure and refused help. I informed Mr. Choate it would be in his best interest if he would let the medic examine him. He complied with my request and went out to see the medic. After returning to his work area, I told him to go lay down in the lounge. He returned about 45 minutes later and continued working until 0700. When Mr. Choate returned to work the following day he complained about his back. I informed Mr. Choate at that time that he should fill out a CA-1 form."

On May 21, 1987 the Office of Workers' Compensation Programs issued a compensation order rejecting appellant's claim on the ground that the injury of March 10, 1987 was not sustained in the performance of duty. A memorandum made part of the order concluded that the cause of appellant's fall was related to an alcoholic encephalopathic seizure and that inconsistencies in the evidence of record suggest appellant did not hit anything when falling.

The Board finds that appellant's injury on March 10, 1987 was not sustained in the performance of duty.

Where a personal, nonoccupational pathology causes an employee to collapse and to suffer injury upon striking the immediate supporting surface and there is no intervention or contribution by any hazard or special condition of employment, the injury is not a "personal injury while in the performance of duty" within the contemplation of the statute; and it does not arise out of a risk connected with the employment and therefore is not compensable.[1] The legal analysis of the case does not end with the determination that appellant's injury was caused by an idiopathic fall. Although a fall is idiopathic, an injury resulting from it is compensable if some job circumstance or working condition intervenes in contributing to the incident or injury, such as if an employee, instead of falling directly to the floor, strikes a part of his body against a wall, a piece of equipment, furniture, machinery or some similar object.[2] Appellant has the burden of establishing that he struck an object connected with his employment during the course of his idiopathic fall.[3]

In the present case appellant filed a claim stating that he was working at three teletype terminals and the next thing he knew he woke up on the floor. He also stated that he was not sure about the

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[1] *Paul V. Trueman*, 19 ECAB 609 (1968).

[2] *Albert E. Hermann, Jr.*, 35 ECAB 167 (1983).

[3] *Josephine M. Callahan*, 35 ECAB 709 (1984).

[events of] the fall and only knew what a witness told him. The witness, Henry J. Washington, said only that he had "heard a noise as if someone had fallen over a piece of equipment and/or a chair and then saw appellant lying face-up on the floor." Appellant's supervisor, Gary J. Percle, said that as appellant was working at two opposing terminals, and as Mr. Percle was seated working 25 feet away, he heard a noise and investigated, finding appellant lying on his side between adjacent terminals convulsing. Mr. Percle did note that a table between the adjacent terminals was on its side in front of an adjacent terminal that appellant was not using.

No witness actually saw appellant fall to the floor or whether he struck any equipment, and appellant has stated that he knew nothing after he passed out until he woke up on the floor. He later suggested that he "tripped over a rolling chair, [fell] on equipment," fractured his spine, and suffered short-term memory loss. To Dr. Schiavi, appellant stated that "the people nearby said that [I] struck [my] back on a table." This statement is not supported by either Henry Washington or Gary Percle. To Dr. Culicchia, appellant provided a history of injury that he struck his back against the computer table but also noted that he suddenly lost consciousness and had no knowledge as to the incident. These factual inconsistencies do not affirmatively establish that appellant struck any intervening object while falling during his March 10, 1987 seizure experience.

Dr. Culicchia stated that appellant apparently lost consciousness before he fell, which is consistent with appellant's first narration of the incident, and opined that, considering appellant's history, it was likely the result of alcoholic encephalopathy. Neither physician addressed the type of compression fracture appellant sustained as being more or less likely the result of a sharp blow from a piece of furniture as opposed to an impact injury from hitting the floor, and no external evidence of a contusion or bruise corresponding to striking an object was noted during any physical exam.

Because of these medical and factual inconsistencies, and because there is no probative evidence that appellant struck an intervening object while experiencing a seizure on March 10, 1987 the Board must affirm the Office of Workers' Compensation Programs decision of May 21, 1987.

The May 21, 1987 decision of the Office of Workers' Compensation Programs is hereby affirmed.

In the Matter of ENZIO A. MUTO *and* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, New York, N.Y.

Docket No. 86-2192; Hearing August 19, 1987;
Issued October 13, 1987

Appearances: *Robert G. Young, Esq.*, for appellant; *Sheldon G. Turley, Jr., Esq.*, for the Director, Office of Workers' Compensation Programs.

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether appellant has met his burden of proof in establishing a causal relationship between appellant's cataracts and his occupational exposure to radiation.

On June 18, 1982 appellant, then a 52-year-old retired air traffic control radar specialist, filed a notice of occupational disease and claim for compensation alleging that he developed bilateral incipient radiant energy cataracts as a result of twenty-two years exposure to low doses of microwave radiation from radars and radio transmitters. Appellant was an air traffic controller from May 1959 to August 20, 1981, at which time he selected an optional annuity retirement.

In an attached statement appellant recalled that on May 9, 1966, while working the radar liaison position, he experienced a partial loss of vision in both eyes in addition to a sudden severe headache. Appellant was treated by Dr. Frank R. Bussey, a Board-certified ophthalmologist, on May 10, 1966. Dr. Bussey concluded that appellant had a transient amblyopia which occurred in cases of ocular migraine, and was not related to any occupational activity. Appellant stated on numerous occasions thereafter he experienced visual fatigue, eye strain and sight disturbances at work. Furthermore, appellant noted that beginning January 1981 he was rarely able to work a full 40 hour work week.

Appellant spent approximately 7 to 7½ hours per workday at his radar display. During peak traffic seasons, he sometimes worked 48 hour weeks. While working at a scope with a horizontal display, appellant kept his eyes 10 to 12 inches from the screen. When using the scopes with vertical displays which became more common in the 1970's, appellant's eyes were approximately 18 inches from the screen. Appellant indicated that other exposure to uncontrolled radiation was limited to occasional use of a microwave oven at his former employment and periodic medical and dental x-ray evaluations.

Appellant's employing establishment provided information on the output power level and distances between transmitters and radar controller positions at appellant's work sites. There was no direct data on the amount of radiation emanating from the radar displays.

Appellant's cataracts were first noted in a report dated September 12, 1969 by Dr. Richard L. Golden, an internist. In a report dated November 25, 1969 Dr. Bussey concluded that appellant had the early stage of cortical cataracts. Dr. Bussey also noted that appellant had correctible vision of 20/20 in each eye. No further medical evidence regarding appellant's cataracts was obtained until 1978.[1]

In a report dated November 9, 1978 Dr. Milton M. Zaret, a Board-certified ophthalmologist, concluded that appellant's principal reason for visual difficulty was due to cataract formation in both of his eyes. Dr. Zaret noted that shortly after the May 9, 1966 incident whereby appellant had a temporary loss of vision, cataractous changes appeared in the lenses of both of his eyes. Dr. Zaret stated that "this sequence of transient, partial obscuration of vision followed by cataract formation is similar to case #3 reported in 'Cataracts and Avionic Radiations' (British Journal of Ophthalmology, Vol 61, No 6, pages 380-384, June 1977). In view of the further fact that there is no other medically reasonable factor in [his] medical history as a cause of cataracts, all indicate the Air Traffic Controller environments in which [appellant has] worked as being the causative factor for [his] cataracts." In a report dated June 2, 1979 Dr. Zaret stated that appellant's "eyes exhibited evidence of radiant energy injury which resulted in ocular asthenopia and partial cataract formation of the lenses bilaterally. . . . In my opinion, the progression of [appellant's] cataracts is due to occupational exposure to radiant energy."

On August 10, 1981 appellant was examined by Dr. Vincent Basilice, an ophthalmologist, who diagnosed mild snow-flake-type cataracts, with some mottling of the macula. Dr. Basilice found appellant's vision correctible to 20/20 in each eye.

In a report dated June 1, 1982 Dr. Zaret stated that "in view of the facts that there is no other medically reasonable etiology for

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[1] Appellant, however, continued to have periodic evaluations of his visual acuity during this time. There was no change in his vision.

[appellant's] condition, that each of the signs and symptoms [he has] acquired [has] been relatable to radiant energy and that Air Traffic Controller environments contain radiations, it is my opinion that [he has] bilateral incipient radiation energy cataracts and that these have been caused and/or aggravated by [his] work as an Air Traffic Controller."

In a CA-20 dated June 23, 1982 Dr. Zaret noted that "appellant worked with hertzian radiations and cathode ray tube displays." Dr. Zaret never received a report on the levels of radiation to which appellant was exposed.

On August 24, 1984 the Office of Workers' Compensation Programs referred the case record, along with the statement of accepted facts to a Radiation Expert Medical Panel. This panel was chaired by Dr. Budd Appleton, a Board-certified ophthalmologist, and consisted of Drs. George R. Merriam, Jr. and Harold W. Skalka, both Board-certified ophthalmologists of professorial rank, and Dr. Karl D. Straub, an internist. William Hendee, Myron Wolbarsht and Basil Worgul were nonmedical specialists included on the panel.

In a report dated August 20, 1985 the panel stated as follows:

> "[Appellant] seeks benefits claiming his cataracts are related to his exposure to nonionizing radiation, but there is no evidence to support this claim. The only medical report [appellant] submits to support it is that of Dr. Zaret, who does not describe [appellant's] lenses. By Dr. Zaret's own statements the kind of lens opacities Dr. Zaret calls "Hertzian cataracts" are posterior and capsular; [appellant's] opacities are cortical and peripheral. Despite that, Dr. Zaret states [appellant's] cataracts must be due to nonionizing radiation because no other cause is apparent. Actually, 20-30 percent of this age group in the population at large show this type of opacity. Many of [appellant's] symptoms are typical of the group generally called 'functional,' especially the phenomenon of globus hystericus, and it is therefore most reasonably to assume his visual symptoms are probably functional as well, since his vision actually remains quite good and his lens opacities appear not to encroach significantly on his visual axis in either eye.
>
> "Most important, the measured doses of nonionizing radiation at [appellant's] workplace are insignificant. Such minute exposures have never been shown to produce lens opacities; those who claim this level of nonionizing radiation is related to cataract have failed to provide any evidence to support that

> claim. By contrast, population studies comparing microwave workers with controls have repeatedly failed to show any difference in the prevalence of cataracts between the two groups.
>
> "[Appellant] has provided no evidence that he was exposed to unusual levels of nonionizing radiation. He has provided no evidence that he is especially sensitive to low levels of that kind of energy, nor is there any logical reason to believe such could be the case. His ocular complaints are of a generally functional nature, and he has no significant visual loss. The positive ocular findings he does have are not of the type alleged to be caused by nonionizing radiation. Based on the foregoing it is our opinion [appellant] has not sustained any ocular effects from occupational exposure to nonionizing radiation."

Dr. Appleton further explained in a report dated April 22, 1986 that the members of the panel did not comment on the possibility of appellant's cataracts being in any way related to exposure to ionizing radiation, but that there was no evidence in the record or the statement of accepted facts to support such a relationship.

By compensation order dated June 27, 1986 the Office denied appellant's claim, finding that the evidence of record fails to establish a causal relationship between appellant's cataracts and occupational exposure to radiation.

On appeal, appellant's attorney contends that the only medical opinion which should be given credence is that of Dr. Zaret, and that the panel of Office medical consultants was not authorized to give a medical opinion because no member of the panel examined appellant or took a history from him.

The Director of the Office filed a memorandum in justification of its decision contending that the weight of medical evidence was represented by the reports of the Office consulting medical expert panel, which concluded that appellant did not sustain cataracts as a result of his employment-related exposure to nonionizing radiation. The Director indicated that while the record contains other medical reports which lend some support for appellant's claim, none of these opinions were of sufficient probative value to create a conflict with the reports of the panel.

The Board finds that the case is not in posture for decision due to a conflict in medical opinion between Dr. Milton M. Zaret and the Radiation Expert Medical Panel, chaired by Dr. Budd Appleton.

Dr. Zaret, a Board-certified ophthalmologist, noted that shortly after the May 9, 1966 incident whereby appellant had a temporary loss of vision, cataractous changes appeared in the lenses of both of his eyes. He stated that this sequence of transient, partial obscuration of vision followed by cataract formation was indicative of cataracts due to radiation, and he referred to an article he had written entitled "Cataracts and Avionic Radiations," for supporting medical evidence. Dr. Zaret concluded that "in view of the fact that there is no other medically reasonable etiology for [appellant's] condition, that each of the signs and symptoms [he has] acquired [has] been relatable to radiant energy and that Air Traffic Controller environments contain radiations, it is my opinion that [he has] bilateral incipient radiation energy cataracts and that these have been caused and/or aggravated by [his] work as an Air Traffic Controller."

The Radiation Expert Medical Panel, chaired by Dr. Appleton, also a Board-certified ophthalmologist, concluded that there was no evidence indicating that appellant's cataracts were related to nonionizing radiation. The Panel noted that the measured doses of nonionizing radiation at appellant's workplace was insignificant and that 20-30 percent of appellant's age group developed cortical and peripheral lens opacities, similar to appellant's. The Panel stated that appellant's ocular complaints were of a generally functional nature, and he had no significant visual loss.

Dr. Zaret is a Board-certified ophthalmologist who concluded that appellant's cataracts were causally related to his employment based upon a personal eye examination and evaluation as well as an accurate statement of appellant's employment history. However, Dr. Zaret's reports did not mention the extent or duration of appellant's exposure to radiation. In addition, Dr. Zaret summarily concluded that there was no other reason for appellant's cataracts without giving a reason for this opinion.

Dr. Appleton, as well as two other doctors on the Panel are also Board-certified ophthalmologists. The Panel opined that appellant's cataracts were not related to radiation exposure based upon an accurate statement of appellant's employment history. The Panel concluded that there was no causal relationship based upon the "insignificant" measured doses of nonionizing radiation at appellant's workplace, as well as the fact that 20 to 30 percent of appellant's age group showed the development of similar types of cataracts. However, the Panel did not physically examine appellant, and their report was based solely upon a review of the record. In addition, while the Panel stated that 20-30 percent of appellant's present age group showed the development of similar cataracts, they did not explain the fact that appellant's cataracts were originally diagnosed on September 12, 1969 by Dr. Richard L. Golden when appellant was only 39 years old. The Panel also failed to explain the significance of the May 29, 1966 incident whereby appellant had a temporary loss of vision.

As a result of both the strengths and weaknesses of the reports by both Dr. Zaret and the Radiation Expert Medical Panel, the Board finds that the reports are of virtual equal weight and there presently exists a conflict of medical opinion. Under the Federal Employees' Compensation Act when there exists a conflict of medical opinion between a claimant's physician and the Office's physician, the claimant should be referred to an impartial medical specialist for resolution of the conflict.[2]

On remand the Office should refer appellant, together with the case record and a statement of accepted facts, to an appropriate impartial medical specialist for examination and reasoned opinion as to whether appellant's cataracts are a result of his occupational exposure to radiation.

The decision of the Office of Workers' Compensation Programs dated June 27, 1986 is hereby set aside and the case remanded for further development and a *de novo* decision consistent with this decision of the Board.

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[2] 5 U.S.C. section 8123(a).

In the Matter of PATRICIA E. LAMORTE *and* VETERANS ADMINISTRATION, EMPLOYEES' HEALTH SERVICES, Brooklyn, N.Y.

Docket No. 86-1647; Submitted on the Record;
Issued October 16, 1987

Before GEORGE E. RIVERS, DAVID S. GERSON, MICHELE VON KELSCH

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant was not without fault in the creation of an overpayment of compensation in the amount of $9,528.82 and that therefore the overpayment was not subject to waiver; and (2) whether the Office properly required immediate repayment of the overpayment in a lump sum of $9,528.82.

On February 6, 1977 appellant, then a 29-year-old part-time cafeteria worker, filed a claim alleging injury on that date when a shelf fell from the wall and struck her on the back of her head. Appellant's claim was subsequently accepted by the Office of Workers' Compensation Programs for the conditions of a cerebral concussion, post concussion syndrome, conversion disorder and hysterical neurosis causally related to her employment injury.

Appellant stopped work for the period February 7, 1977 through April 2, 1977 and went on sick leave on April 3, 1977. The Office approved continuation of pay for the period February 7, through March 23, 1977. She received compensation for temporary total disability for the period March 26, 1977 through April 8, 1977. She returned to work between September of 1977 and May of 1978, but has not worked since July, 1978.

By letter dated June 6, 1977 the Office informed appellant that she had received an overpayment of compensation in the amount of $143.02. The overpayment was created because appellant was paid compensation on the basis of a full-time five day work week for the period March 27, 1977 to April 2, 1977, while appellant only worked part-time for eight hours, two days a week. The record indicates that appellant worked only on Saturdays and Sundays.[1]

By letter dated November 17, 1978 appellant, through her representative, notified the Office that she had stopped work on July 22, 1978 and claimed disability as a result of the February 6, 1977 employment injury. After further development of the medical evidence, the Office accepted appellant's claim by letter dated September 1, 1981. The Office awarded compensation retroactive for the period commencing July 22, 1978 and notified appellant that she would receive continuing compensation after May 18, 1981. The Office also advised appellant that she should receive a compensation payment in the amount of $1,240.00 for the period of disability from March 10, 1981 to May 18, 1981. Appellant was returned to the automatic rolls effective December 3, 1981 and received compensation for a 16 hour work week for the period September 15, 1981 to December 2, 1981. Appellant is still in receipt of continuing compensation benefits.

By letter dated November 16, 1981 the Office notified appellant that it had made a preliminary determination that there had been an overpayment of compensation in the amount of $9,528.82. The overpayment occurred because appellant's payrate was erroneously calculated based upon a 5 day work week for the period July 22, 1978 to May 18, 1981, while appellant was only working two days per week when injured. The Office made a preliminary finding that appellant was without fault in the creation of the overpayment. The Office advised appellant that she could submit further evidence, in writing or at a hearing before an Office hearing representative, on the issue of the existence and amount of the overpayment, whether she was at fault in its creation, and whether the overpayment should be repaid.

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[1] The Board notes that appellant did not appeal from the overpayment finding and it is not an issue on the present appeal.

By letter dated April 27, 1983 the Office once again notified appellant that it had made a preliminary determination that there had been an overpayment of compensation in the amount of $9,528.82.

In response to the letter dated April 27, 1983 appellant stated: "I feel the [$9,528.82] should be waived, due to the fact that I am receiving $46 a week for my injury dated February 6, 1977. I feel it would not be in good conscience to penalize me for a government error."

A hearing was held before an Office hearing representative on the issue of overpayment on July 19, 1984. Appellant claimed that she was without fault with respect to the overpayment in that she did not know the rate of pay of the compensation. Since the initial check covered approximately two years of disability she had no way of realizing that the calculations were wrong. Appellant also claimed that if she was found to be without fault with respect to the overcompensation she was entitled to waiver on two counts. One, that to force her to repay the debt would defeat the purpose of the Compensation Act; and two, that requiring her to repay the debt would impose upon her financial hardship. Appellant's husband stated that his annual earnings were approximately $30,000.00. Appellant's monthly expenses were as follows: $420 rent for a principal residence; $200 mortgage payment for a second home; $400 food; $150 utilities; $107 charge cards; $150 clothes; $220 car payment; $107 life and health insurance; $50 car insurance; $60 car maintenance. Appellant and her husband own the second home in upstate New York valued at $25,000.00 and a mutual fund of approximately $4,500.00. Appellant stated that if she were required to repay the debt she could pay $50 a month.

By decision dated April 8, 1986 the Office hearing representative determined that there existed an overpayment of compensation in the amount of $9,528.82, which occurred between July 22, 1978 and May 18, 1981. Appellant was held to be not without fault in the occurrence of the overpayment, and was thereby precluded from consideration of waiver of collection. The Office found that appellant had sufficient financial resources to enable immediate recovery of the overpayment in full by the Office.

On appeal, appellant once again asserted that she was not at fault in the creation of the overpayment. In addition, appellant stated that she presently separated from her husband and a lump sum repayment of the $9,528.82 would create an undue hardship.

The Board finds that the Office properly determined that appellant was not without fault in the creation of an overpayment of compensation in the amount of $9,528.82 and that therefore the overpayment was not subject to waiver.

Section 8129(b) of the Act [2] provides:

> "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."

In determining whether an individual is "without fault," what constitutes "fault" depends on whether the facts show, among other things, that the incorrect payment resulted from:

> "(a) An incorrect statement made by the payee which the payee knew or should have known to be incorrect; (b) Failure of the payee to furnish information which the payee knew or should have known to be material; or (c) Acceptance of a payment which the payee either knew or should have been expected to know was incorrect." [3]

In the present case the record indicates that the Office applied the third standard to appellant, acceptance of a payment which the payee either knew or should have been expected to know was incorrect. The overpayment was created by the Office erroneously calculating appellant's compensation entitlement on the basis of a five day work week rather than the correct two day work week. Appellant received a prior overpayment of compensation when the Office committed precisely the same error in computing her compensation entitlement between February and April 1977. Appellant was advised of this error by Office correspondence dated June 6, 1977. The money that appellant received for the period July 22,

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[2] 5 U.S.C. section 8129(b).

[3] Pursuant to *Califano v. Yamasaki*, 422 U.S. 682, 99 S. Ct. 2545, the Office established procedures to be followed in handling overpayment of compensation cases. These procedures are detailed in the *Federal (FECA) Procedure Manual*, Chapter 2-901.

1978 through May 3, 1980 was in the amount of $11,003.18. That amount is approximately two and one half times the amount of money she would have earned in salary had she continued working at her federal employment during the period covered by the check. Appellant's allegation that she had no way of knowing that the calculations were wrong because the initial check covered approximately two years of disability is without merit. Appellant's knowledge of the prior overpayment, together with the fact that she received a check for approximately two and one half times the amount of money she would have earned in salary, is sufficient for the Office to find that appellant either knew or should have known that the amount of compensation she received was incorrect.[4]

Therefore, appellant's allegation that she had no way of reconciling her correct compensation entitlement with the money she was receiving, and therefore was forced to rely upon the information provided to her by the Office claims examiner, is unpersuasive.

Appellant's acceptance of a check which she knew or should have been expected to know was incorrect means that she is not without fault in the creation of the overpayment.

Since appellant has been held to be not without fault in the creation of the overpayment of compensation, she is not entitled to consideration of waiver of collection thereof. The overpayment must be recovered.

The Board also finds that the Office properly found that appellant had sufficient financial resources to enable immediate recovery of the overpayment of compensation in the amount of $9,528.82.

The record indicates that appellant and her husband jointly own a second home valued at $25,000.00 and have a mutual fund of approximately $4,500.00. In addition appellant's husband's annual earnings are approximately $30,000.00, which enables appellant to meet her expenses without financial hardship. While appellant alleges, on appeal, that she and her husband are presently separated, evidence of their separation is not part of the case record, and therefore is not considered by the Board in this decision. Appellant's financial resources, as stated above, are sufficient for the Office to require immediate repayment of the overpayment of compensation in the amount of $9,528.82.[5]

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[4] In situations where an appellant's compensation check is far greater than the correct amount, the Board has held that the appellant is not "without fault" with respect to the overpayment of compensation. *See Luis D. Alamo*, 35 ECAB 1045 (1984).

[5] An individual's total income includes any funds which may reasonably be considered available for her use, regardless of the source. Income to a spouse will be considered available to the individual if the spouse is living in the household both at the time the overpayment was incurred and at the time waiver is considered. *Federal (FECA) Procedure Manual*, chapter 2-901, pg. 3.

The April 8, 1986 decision of the Office of Workers' Compensation Programs is affirmed.

In the Matter of ELVIRA B. LIGHTNER, claiming as widow of DONALD F. LIGHTNER *and* U.S. POSTAL SERVICE, POST OFFICE, Youngstown, Ohio

Docket No. 86-695; Hearing December 9, 1986;
Issued October 29, 1987

Appearances: *Herbert A. Doyle, Jr.*, for appellant; *Sheldon G. Turley, Jr., Esq.*, for the Director, Office of Workers' Compensation Programs.

Before MICHAEL J. WALSH, DAVID S. GERSON, MICHELE VON KELSCH

The issue is whether the employee's death on February 1, 1983 occurred while he was in the performance of his federal employment duties, within the meaning of the Federal Employees' Compensation Act.

On October 26, 1973 the employee, then a 51-year-old letter carrier, filed a claim alleging that he sustained a right knee injury on that date when he slipped on some steps while delivering mail. He did not lose any time from work. The Office of Workers' Compensation Programs accepted that the employee sustained a right knee strain and authorized payment of medical benefits.

On January 16, 1976 the employee filed a claim alleging that he sustained a second injury to his right knee when he slipped and fell on ice that day. The Office accepted the employee's claim for a right torn medial meniscus, and authorized continuation of pay during his absence from work.

On July 9, 1977 the employee filed a claim for a third knee injury sustained on July 8, 1977 when he tripped going down steps. The Office accepted that appellant sustained the following medical conditions as a result of that injury: ruptured medial meniscus, right knee; instability medial collateral ligament, right knee; loose bodies, right knee; chondromalacia medial joint, right knee; and cartilage ulcer lateral femoral condyle, right knee. The Office approved compensation for temporary total disability and for wage loss from July 28, 1977 through February 11, 1980.

By decision dated February 10, 1981 the Office granted the employee a schedule award for 30 percent permanent loss of use of the right leg, covering the period February 12, 1980 through October 8, 1981. During the period of the schedule award the employee elected to receive a civil service annuity.

By letter dated April 7, 1982 the Office contacted the employee concerning the possibility of undergoing vocational rehabilitation. The initial interview was held on April 29, 1982. The employee was referred to a private vocational rehabilitation agency to assist in the development of his rehabilitation program.

The employee was reinstated on compensation for temporary total disability effective May 3, 1982 when he was referred to the employing establishment for possible reemployment.

The employee returned to work at the employing establishment in a light-duty part-time position on October 4, 1982. However, he again stopped work on November 15, 1982 and was hospitalized that same day complaining of swelling of both legs associated with shortness of breath. He was discharged on December 1, 1982 with the diagnosis of congestive heart failure.

The Office reinstated the employee on compensation for temporary total disability because he was unable to work due to his knee problems.

On February 1, 1983 the employee had a breakfast meeting with representatives from the private vocational rehabilitation agency. On his way home from the meeting the employee stopped at his son's place of employment and had to be taken by ambulance to a hospital emergency room. The emergency room report noted a history of shortness of breath during the preceding 24 hours, worse that morning; and a history of congestive heart failure. The employee had cardiac arrest and resuscitation efforts were unsuccessful. The death certificate stated the cause of death as "cardio-respiratory arrest" due to "congestive heart failure" due to "coronary artery arteriosclerosis."

The private vocational rehabilitation agency submitted reports dated November 17, 1982, January 6, 1983, and February 1, 1983 which detailed the rehabilitation process the employee underwent.

On March 14, 1983 appellant (the employee's widow) filed a claim for death benefits, alleging that the employee's death was causally related to his employment. In an accompanying statement, appellant alleged that the employee "was under a great deal of stress due to delays in [compensation] checks owed to him" by the Office. She stated that he was scheduled to undergo a heart catheterization on February 7, 1983. Appellant stated that the employee was caused further stress when he was called late at night on January 31, 1983 to attend the meeting on February 1, 1983 with the private vocational rehabilitation agency. She stated that the employee did not sleep that night due to the stress of having to attend the meeting. She stated that "on his way home from the meeting he suffered a heart attack and died the same day. . ." She also submitted copies of the employee's February 1, 1983 hospital records. On the reverse of appellant's claim form was a March 8, 1983 report by Dr. Ronald Aiello, an osteopath, which related a history of "anxiety and stress due to meeting" and diagnosed "acute myocardial infarction" as the direct cause of death. The doctor checked the box marked "yes" in response to the question whether the employee's death was due to the aforementioned stress, and stated the following: "acute stress situation putting excessive stress on heart already compromised by coronary artery disease."

By letter dated April 6, 1983 the Office informed appellant of the evidence necessary to establish her claim. On May 23, 1983 appellant responded to this request by submitting an April 16, 1983 statement in which she alleged that the employee reacted angrily to the telephone call he received from the rehabilitation specialist on January 31, 1983. She stated that the employee became withdrawn, restless, and could not sleep. In addition appellant submitted a May 2, 1983 report from Dr. Aiello, in which he noted a history of the employee "having angina symptoms for the past two years" which point to him having "significant coronary artery disease which was responsible for his congestive heart failure." Regarding the causal relationship between the employee's death and the events of January 31 and February 1, 1983, Dr. Aiello stated:

> "The fact that he was called so late at night and given such short notice was cause for a great deal of anxiety and tension, and . . . it further resulted in he not being able to sleep that night. [sic] This subsequently produced a strain on an already compromised heart. On his return from the meeting [the employee] suddenly developed chest pain and shortness of breath, he was brought to the emergency room where he subsequently developed cardiac arrest; despite several attempts to resuscitate [him] he expired on February 1, 1983. It is my opinion there is a direct relationship between the events that occurred beginning on January 31, 1983 and [the employee's] death the following morning."

By compensation order dated November 7, 1983 the Office rejected appellant's claim on the basis that the employee "was not in the performance of duty; his death did not arise out of or in the course of his employment."

On November 18, 1983, appellant requested a hearing before an Office hearing representative. In a February 7, 1984 supplemental statement, appellant repeated her contentions concerning the stress experienced by the employee due to the rehabilitation meeting, and expanded the claim by alleging that stress resulting from waiting for his compensation checks was a factor in the employee's death.

At the hearing held on January 28, 1985 appellant testified that, to her direct knowledge, the content and tenor of the telephone conversation on January 31, 1983 from the private sector vocational rehabilitation consulting firm upset and agitated the employee, who was already upset and agitated because of late compensation payments from the Office. Appellant and her two children presented argument that it was improper for the vocational rehabilitation firm to place a telephone call to the employee at 10:00 p.m. scheduling a meeting for the following morning at 8:30 a.m. in the certain knowledge that he was scheduled to undergo cardiac catherization for treatment of a heart condition one week later.

Introduced into evidence at the hearing were a statement from a co-worker of the employee who was also visited by the vocational rehabilitation firm employees on February 1, 1983, a statement from a person present when the ambulance was called to convey the employee to the hospital, a copy of correspondence from the widow's representative to the vocational rehabilitation firm attempting to secure the qualifications of the two representatives of that firm who met with the employee on February 1, 1983, a photocopy of the February 1, 1983 report from the vocational rehabilitation consulting firm, a copy of the May 2, 1983 report from the employee's treating physician, Dr. Aiello, and photocopies of the Office memorandum and decision of November 7, 1983.

By decision dated November 5, 1985, finalized on November 6, 1985, the hearing representative found that the circumstances and events commencing with the telephone call on January 31, 1983 involved the administrative actions taken by the Office in its adjudication of the claim to determine the employee's entitlement to compensation based upon either a total or partial loss of wage-earning capacity, therefore these circumstances and events did not constitute factors of employment within the meaning of the Federal Employees' Compensation Act; hence the employee's death did not occur while he was in the performance of his federal employment duties, within the meaning of the Act.

The Board finds that the employee was not in the performance of duty at the time of his death on February 1, 1983.

In the present case, the Office accepted the employee's claims for a right knee strain as a result of the 1973 injury, a right torn medial meniscus as a result of the 1976 injury, and other conditions related to the right knee as a result of the 1977 injury. The Office did not accept the employee's cardiac condition as being related to his employment, thus appellant has the burden of proving that the employee's death which resulted from an acute myocardial infarction was causally related to factors of his federal employment.

Congress, in providing for a compensation program for federal employees, did not contemplate an insurance program against any and every injury, illness, or mishap that might befall an employee contemporaneous or coincidental with his employment; liability does not attach merely upon the existence of an employee/employer relation.[1] Instead, Congress provided for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[2] The Board has interpreted the phrase "while in the performance of duty" to be the equivalent of the commonly found requisite in workers' compensation law of "arising out of and in the course of employment." "In the course of employment" deals with the work setting, the locale, and time of injury whereas "arising out of the employment" encompasses not only the work setting but also a *causal* concept, the requirement being that an employment factor caused the injury.[3] In addressing this issue, the Board has stated:

> "In the compensation field, to occur in the course of employment, in general, an injury must occur (1) at a time when the employee may reasonably be said to be engaged in his master's business; (2) at a place where he may reasonably be expected to be in connection with the employment; and (3) while he was reasonably fulfiliing the duties of his employment or engaged in doing something incidental thereto."[4]

FECA Program Memorandum No. 107 states the following:

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[1] *Minnie M. Heubner*, 2 ECAB 20 (1948); *Christine Lawrence*, 36 ECAB 422 (1985).

[2] *See* 5 U.S.C. section 8101 *et seq.*

[3] *Denis F. Rafferty*, 16 ECAB 413 (1965).

[4] *Carmen B. Gutierrez*, 7 ECAB 58 (1954) at 59.

> "The Bureau has determined that an individual who is undergoing vocational rehabilitation in accordance with 5 U.S.C. 8104 is considered to be 'in performance of duty' while undergoing training or while going to and from the training institution. If he should sustain injury under these circumstances, he would be entitled to appropriate benefits.
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> "In this respect, although these injuries are not job related in the usual sense, they are nevertheless related to the employment in that they occur during the performance of necessary or reasonable activity that would not have been undertaken but for the compensable injury."

In the instant case, the employee was not "undergoing vocational rehabilitation" nor was he "going to or from the training institution" on February 1, 1983; rather the employee met with the vocational rehabilitation representatives. Thus the employee was not in the performance of duty as described in the FECA Program Memorandum above because he was not "undergoing vocational rehabilitation."

Invoices from the rehabilitation service document services in the nature of medical coordination, employer contact and coordination, contact with the employee, counseling and guidance, and report writing from May 10, 1982 through February 2, 1983. There is no indication that the employee ever participated in a formal retraining program. Appellant's representative contends on appeal that the employee was receiving compensation under section 8104 of the Act,[5] which provides for the payment of compensation to a claimant while he is undergoing vocational rehabilitation. However, the record discloses that the employee was receiving compensation under 5 U.S.C. 8105 based on his knee condition and not because he was in a vocational rehabilitation program under 5 U.S.C. 8104. The employee had returned to work in a light duty part-time position on October 4, 1982 but stopped on November 15, 1982 because of his knee condition, and compensation was restored because he was disabled due to the knee condition.

At the February 1, 1983 breakfast meeting the employee gave the rehabilitation representatives a medical update; he informed them he was scheduled to go into the hospital on February 8, 1983 for a heart catheterization; and his orthopedist wished to replace his prosthesis with a new one. The employee also expressed concerns regarding his compensation, annuity, and federal tax. This meeting did not constitute rehabilitation training as contemplated under Program Memorandum 107. The Office Procedure Manual specifically provides that "services such as counseling, testing, work evaluation, or job follow-up by themselves do not constitute a rehabilitation program. . . .[6] The services rendered by the rehabilitation agency from May 10, 1982 through February 2, 1983 are consistent with the services outlined in the procedure manual which do not constitute a rehabilitation program.

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[5] 5 U.S.C. section 8104(a).

On appeal, appellant's representative contends that, while the employee was not technically undergoing training in the formal sense, "he was engaged in a comprehensive rehabilitation effort involving all the *prerequisites* of a formal training program." He argued that the incidents of January 31, 1983 and February 1, 1983 should be considered related to the employee's employment "in that they occurred during the performance of necessary or reasonable activity that would not have been undertaken but for the compensable injury."

The term "but for" set forth in FECA Program Memorandum No. 107 applies to persons receiving compensation under section 8104 of the Act, *i.e.*, those persons engaged in a rehabilitation program. However, as noted above, the employee in the instant case was not receiving compensation under section 8104, rather he was receiving compensation because of a recurrence of disability due to his knee problem. Thus, the "but for" argument under section 8104 of the Act is not applicable to the present case.

Appellant also contends that the employee was upset because of late compensation payments from the Office. This is an administrative function of the Office from which the employing establishment derived no benefit whatsoever. The receipt of compensation benefits an injured employee and not the employer. Likewise, compensation is not a requirement imposed upon the employee therefore it is not a factor of employment;[7] the employee is not obligated to receive compensation, he may choose to use leave or not receive any pay, or in the event of a retired employee he may choose benefits under the Office of Personnel Management.[8] The payment of compensation is an administrative function that totally benefits the employee.

Thus, the Board finds the circumstances surrounding the employee's death to be too remote from the employment to be considered arising out of the employee's employment duties.

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[6] Federal (FECA) Procedure Manual, Chapter 2-813 Reemployment and Rehabilitation, Part 2—claims.

[7] *See Virgil M. Hilton*, 37 ECAB 806 (1986).

[8] See 5 U.S.C. 8116(a); *Nelson Holmes*, 27 ECAB 409 (1976).

Appellant cited two Oregon cases involving vocational rehabilitation in which the Court held the new injuries, sustained by the employees while they were involved in vocational rehabilitation programs, were compensable by their original employers.[9] The Court's rationale was that the new injuries were a natural and direct consequence of the primary injuries. The instant case, however, can be distinguished from the Oregon cases in that the employees in both Oregon cases were involved in actual structured retraining programs at the time of their new injuries, whereas, the employee in the instant case was not. As noted in FECA Program Memorandum No. 107 above, FECA has adopted a policy consistent with the Oregon cases. However, the employee in the instant case was not in a formal training program and thus, the Oregon cases cited by appellant are not applicable.

The decision of the Office of Workers' Compensation Programs, dated November 5, 1985 and finalized on November 6, 1985, is affirmed.

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[9] *Wood v. State Accident Insurance Fund*, 30 Or. App. 1103, 569 P. 2d 648 (1977); and *Firkus v. Alder Creek Lumber*, 48 Or. App. 251, 617 P. 2d 620 (1980).

In the Matter of Joseph Allen Miles *and* Department of Defense, Naval Medical Research Institution, Bethesda, Md.

Docket No. 87-1260; Submitted on the Record;
Issued October 29, 1987

Before George E. Rivers, Michele von Kelsch, Willie T.C. Thomas

The issue is whether appellant's Voyt-Koyanaga-Harada disease and acquired auto-immune disorder are causally related to factors of his federal employment.

On March 13, 1984 appellant, then a 47-year-old supervisor biological laboratory technician, filed a claim alleging he had an acquired auto-immune disorder which he attributed to the factors of his federal employment.[1] Appellant stated that he first became aware of the possible relationship of his condition to his federal employment after treatment by his physician on February 23, 1984. Appellant stopped work on December 17, 1983 and has not returned.

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[1] On April 24, 1984 appellant provided a statement of his work history in which he noted that he had worked since 1956 at the National Institute of Health and had worked on animals as experimental subjects which brought him in direct contact with dogs, sheep, monkeys and an alligator.

In support of his claim, appellant submitted the March 13, 1984 report of Dr. Stanley L. Cohan, a Board-certified neurologist of professorial rank, who stated that he first treated appellant in November 1983 for weight loss and fatigue. He noted that appellant has a history of uveitis, discovered in early 1983, which was treated with medication and had developed weakness in the lower extremities. Dr. Cohan stated:

> "Examination revealed an alert and cooperative man who had normal mental status functioning. The patient's cranial nerve examination was unremarkable but the motor examination revealed a wide base unsteady gait, spasticity of the lower extremities, bilateral proximal leg weakness, as well as finger-to-nose, finger-to-finger, and heel-to-shin ataxia. The patient had marked increased deep tendon reflexes, having clonus at the knees and ankles, and bilateral Babinskis. The patient's vibratory and position sense were also decreased distally in the lower extremities and much more than the upper extremities. Lastly, the patient's skin revealed the presence of vitiligo.
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> "The patient's examination revealing the presence of uveitis, vitiligo, and central nervous system dysfunction raises the possibility of autoimmune central nervous system disease. The patient had been seen earlier in the year by Dr. Brian H. Avin, a neurologist, and he had diagnosed multiple sclerosis as the cause of Mr. Miles difficulties. I do not agree with this diagnosis. Although the patient has central nervous system findings commonly found in multiple sclerosis, Mr. Miles' inflammatory disease is not restricted to his central nervous system. There is uveitis, there is allergic thyroiditis, as well as antibodies to parietal cells of the intestines, salivary gland, adrenal gland, and smooth muscle. The patient has elevated oligoclonal globulins in his CSF [cerebrospinal fluid] but also has them increased in the periphery. The patient was seen by rheumatologic consultant who also agreed that the patient had widespread autoimmune disease involving multiple organs.
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> "On the basis of the patient's history, physical findings, as well as laboratory results, we feel that the patient has an acquired autoimmune disorder. Considering the fact that the patient worked as an animal handler and thus had extensive ex-

> posure to potential sources of viral exposure, we feel that his employment is a likely cause of his disease. Although not explaining all autoimmune disease, viral exposure does account for an appreciable percentage of autoimmune disease, an example being hepatitis B antigen which is associated with so many cases of polyarteritis."

The Office of Workers' Compensation Programs requested that appellant submit a detailed statement with regard to the factors of his employment to which he attributed his condition. The Office also requested that the employing establishment submit appellant's job description and records relating to all medical treatment administered to appellant.

Appellant submitted hospital records from the Georgetown University Hospital for treatment he received during his hospitalization for the period January 26, 1984 to February 10, 1984. The records indicate that appellant was admitted for evaluation of progressive lower extremity weakness and hyperreflexion. He was discharged with a diagnosis of Voyt-Koyanaga-Harada syndrome and hyperthyroidism.

By letter dated April 30, 1984 the employing establishment noted that appellant's duties included supervision of laboratory personnel and overseeing maintenance contracts and radioisotope inventory sheets. Appellant also performed animal surgery, intubation, and physiologic monitoring. The employing establishment noted that appellant's statement as to his work history was accurate with regard to his duties and exposure to animals.

The Office prepared a statement of accepted facts and referred appellant, together with the case record, to Dr. Yuill Black, Board-certified in allergy and immunology. In a report dated October 24, 1984 Dr. Black stated that appellant was seen in consultation with Dr. William F. Thompson, an associate of Dr. Black, on August 30, 1984 and September 10, 1984. The physicians reported their findings on examination and stated:

> "No history of atopy was obtained and consequently no skin testing was conducted. The history is interesting in that he had bilateral iritis diagnosed in 1967 and this was treated intermittently with courses of steroids. A diagnosis of uveitis was made in early 1983 and this was treated with massive doses of oral Prednisone. The patient was seen by Dr. Cohan of Georgetown University Hospital in January 1984 and a diagnosis of autoimmune central nervous disease was made.

"The following are answers to the questions submitted:

"1. We do not believe the evidence presented reveals any 'direct cause, acceleration, precipitation or aggravation' of the present condition due to factors of employment.

"2. [The diagnoses] are (a). Uveomeningo-encephalitis, by history; (b). Hyperthyroidism; (c). Acquired autoimmune disease.

"3. [Any temporary or permanent employment-related aggravation]. Not applicable.

"4. [Any work-related disability]. Not applicable.

"5. [Rationale]. This gentleman has acquired autoimmune disease affecting the eyes, thyroid gland and the central nervous system. He also has vitiligo. He has a long history of exposure to animals as a laboratory worker.

"The case was discussed briefly on the telephone with Dr. Cohan of Georgetown University Hospital. He could give no actual proof of virus-induced autoimmune disease caused by exposure to animals. He did however state that the literature does suggest there could be a relationship between the two We reviewed the literature for acquired autoimmune disease caused by viruses in personnel working with animals. Nothing could be found by us directly addressing the problem of autoimmune disease due to viruses resulting from animal exposure. Other workers in similar situations with similar exposures have not developed acquired autoimmune disease symptoms. Conversely there are patients with acquired autoimmune disease symptoms who have no history of close, direct exposure to animals. Moreover, there is no history of Mr. Miles' co-workers developing any immune disease.

"In view of the above, we would conclude that Mr. Joseph Miles has an acquired autoimmune disease with extensive involvement including the eyes, thyroid gland and cortico-spinal tract of the central nervous system. The cause of his problem is unknown. Various etiologies have been proposed for this symptom complex but these are speculative only. Some authorities have postulated a connection between certain viral antigens and development of acquired autoimmune disease but we know of no way that this can be proven in individual cases. Therefore, we can find no proof that Mr. Miles' occupation played a direct or indirect part of his present condition."

On November 7, 1984 an Office medical adviser reviewed the case record and noted that he concurred with the opinion expressed by Drs. Black and Thompson. The medical adviser noted that the case file had been previously reviewed by an Office medical adviser "which necessitated an impartial immunological specialist [referral]."[2]

By compensation order dated January 8, 1985 the Office rejected appellant's claim for compensation finding that the weight of medical evidence established that there was no causal relationship between the condition claimed and the employment factors.

On February 6, 1985 appellant, through his attorney, requested a hearing before an Office hearing representative. Appellant subpoenaed the attendance of Dr. Black and Dr. Thompson and Dr. Cohan appeared on behalf of appellant. At the hearing held on September 9, 1985, Dr. Cohan stated that appellant had an extensive and widespread autoimmune disease and had developed antibodies which affected his thyroid gland, intestinal lining, adrenal glands and his smooth muscles. He indicated this was an unusual disease as appellant had developed antibodies against many different tissues and noted that appellant's work history was one in which he worked with many animals, often extremely ill, and which died of infectious disease. He stated that appellant worked in a high risk exposure environment and had exposure to many organisms while working with infected animals. Dr. Cohan stated that he had reviewed appellant's work history at the National Medical Research Institute and was informed by the Institute's director that a lot of work was being done with various infectious agents. Dr. Cohan also noted that appellant had a family history for vitiligo, a depigmentation of the skin due to an immunity-induced loss of the cells that make pigment, and noted that based on appellant's genetic background "he might have a much more dramatic reaction, much more widespread disease that another person standing right next to him in the work place who is exposed to the very same substance." Dr. Thompson testified that his examination of appellant was primarily focused on an allergy-oriented situation and that he did not do any further tests to determine whether or not appellant had an acquired autoimmune disorder. Dr. Thompson stated that appellant's condition was rare and that he conducted a search of medical literature and "couldn't find anything that deals specifically with animal handlers and increased susceptibility to autoimmune disease." Dr. Thompson indicated that his search of the medical literature did not pinpoint a cause for appellant's condition and for this reason he had negated a causal relationship with appellant's work place. Dr. Black testified that he knew of no case similar to appellant's and, after reviewing medical literature on autoimmune disease, could not find any definite cause and effect relationship between appellant's condition and the factors of his federal employment. Both physicians noted that the medical literature they reviewed focused on Voyt-Koyanaga-Harada disease while appellant's symptoms were of a more broadly based disease.

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[2] The case record does not reflect any review of the medical evidence by an Office medical adviser prior to November 7, 1984.

In a decision dated May 1, 1986, finalized May 2, 1986, the Office hearing representative affirmed the January 8, 1985 decision on the ground that the weight of medial opinion evidence was represented by the report and opinions of Drs. Black and Thompson, who provided a consulting opinion on the issue of causal relationship.

The Board finds that the case is not in posture for decision due to an unresolved conflict in medical opinion necessitating referral to an impartial specialist under section 8123(a).[3]

Dr. Cohan, appellant's attending physician Board-certified in neurology, expressed an opinion in favor of appellant's claim that his autoimmune disorder was caused by the factors of his federal employment. Drs. Black and Thompson, Board-certified in allergy and immunology, expressed an opposing opinion on the role of appellant's federal employment in his acquired autoimmune disease. The opinions expressed by the physicians in this case were based on a review of appellant's federal employment and the factors attributed by him to have caused or accelerated his condition.

The Office, on remand, should refer appellant, together with the case record and a statement of accepted facts, to an impartial medical panel consisting of specialists in the fields of neurology, immunology, and internal medicine, and request that an opinion be provided on whether appellant's diagnosed conditions are causally related to the factors of his federal employment. Following such further development as the Office deems necessary, it shall issue a *de novo* decision on appellant's claim.

The May 1, 1986 decision of the Office of Workers' Compensation Programs, finalized May 2, 1986, is set aside; the case is remanded for further development, to be followed by a *de novo* decision.

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[3] 5 U.S.C. section 8123(a).

In the Matter of WARNER E. ARMBRUSTER *and* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Hilliard, Fla.

Docket No. 86-2205; Hearing September 22, 1987;
Issued October 30, 1987

Appearances: *Robert G. Young, Esq.*, for appellant, *Sheldon G. Turley, Jr., Esq.*, for the Director, Office of Workers' Compensation Programs

Before MICHAEL J. WALSH, GEORGE E. RIVERS, WILLIE T.C. THOMAS

The issue is whether appellant's eye conditions were causally related to occupational exposure to radiation.

On April 5, 1977, appellant, then a 43-year-old radar controller, filed notice of occupational disease alleging that he sustained a radiant energy cataract in his right eye and a radiant energy injury in his left eye. The record establishes that appellant worked at several of the employing establishment's facilities from March 31, 1958 to October 31, 1978, and that he was medically disqualified for work as an air traffic control specialist on February 16, 1977 because of deficient vision.

In a routine employing establishment physical report dated May 22, 1969, an L-shaped linear, granular, lenticular density of the left eye was found which did not interfere with appellant's vision. On June 20, 1974, Dr. K. Ocasio Cabanas noted a posterior cortical localized nasal cataract in the right eye and prescribed new corrective lenses. On October 7, 1975, Dr. Paul V. Sullivan prescribed another change of lenses and described his findings as "O.D. (right eye): Posterior subscapular cataract in superior nasal quadrant of lens. O.S. (left eye): Brown pigment line on posterior surface of lens."

In a form report dated March 2, 1977, Dr. Milton M. Zaret, a Board-certified ophthamologist, diagnosed radiant energy cataract of the right eye and radiant energy injury of the left eye which he related to exposure to radiant energy from radio and radar equipment continuously from 1957 to the present. He described his clinical findings as a capsular cataract of the entire posterior aspect of the right lens extending onto the anterior surface and a brown pigment streak on the posterior surface of the left lens. Dr. Zaret also submitted an article he had co-authored entitled "Cataracts and

Avionic Radiations," and in a report dated June 1, 1978, he noted the following:

> "Regarding the question of the amount of the exposure, to my knowledge, this figure is not available. . . .
>
> "Despite the neglect and/or failure of the FAA in this matter, it is reasonable to assume that Mr. Armbruster was exposed occupationally to artificially created levels of nonionizing irradiation undoubtedly at many different wavelengths, each of which exceeded naturally occurring background irradiation at the specific wave-length by at least more than two orders of magnitude. . . .
>
> "There is no history of preexisting cataracts or eye injury. There is documentary proof that Mr. Armbruster was in excellent health . . . until the cataract of the right eye was acquired later in life, first being discovered around 1974. Cataractogenic factors such as those due to metabolic, toxic substance, aging, etc., factors produce bilateral, symmetrical cataracts which are not present here. Unilateral cataracts due to intraocular inflammation have a history of uveitis (absent here), have polychromatic granules on the outer surface of the lens (absent here) and rosetta type cataracts in the lens substance (also absent here). This rules out all other causes for Mr. Armbruster's cataract except radiant energy exposure. . . .
>
> "Split-lamp examination revealed Mr. Armbruster had extensive capsular cataract of the right lens. In addition to involving practically the entire posterior surface of the lens, several small areas of the anterior surface of the lens also exhibited capsular cataract.
>
> "Under these circumstances, there is no other known causal relationship except for exposure to radiant energy. . . .
>
> "Mr. Armbruster was not the first nor the last Air Traffic Controller who has developed capsular cataract. Indeed, based on that marker, I myself have confirmed its presence in about eight other Air Traffic Controllers who had been referred to me for consultation. By itself, such a large cluster established his occupational environment as being the causal factor by the simple test of medical reasonableness."

In a report dated March 23, 1978, Dr. Robert F. Hook, a Board-certified ophthamologist and appellant's attending physician who removed the cataract in the right eye by phacoemulsification on January 25, 1978, stated the following:

> "Any answer on my part must be recognised as controversial since the effect of micro-wave energy on the lens of the human eye is not yet certain beyond doubt. Secondly, there is no proof of knowledge on my part that the devices used on his job emit any energy waves at all, and if so to what amount.
>
> "If any energy is emitted, and human lenses are exposed to these, then some inferences can be drawn from data which does reveal cataractogenic effects. It is known that heavy doses can bring cataracts on rather rapidly, and therefore cause and effect are easily established.
>
> "The questions arise with small doses which are probably cumulative where the human lens is concerned, since it in itself has no demonstrable ability to repair itself from any insult whatsoever.
>
> "The manufacturers of many wave energy devices have disclaimed any causal relationship to cataract formation, and indeed effects are so delayed and gradual that it is difficult to prove otherwise.
>
> "Humans vary in their resistance to all diseases and some individuals may well be more susceptible to radiation effects than others. This then brings in the case of Mr. Armbruster whose compatriots sitting beside him may not have been effected while he was.
>
> "Cataracts usually occur in much older individuals unless some disease process causes early cataract formation. Usually this is a unilateral problem, while Mr. Armbruster shows signs of lens changes in both eyes . . . The changes in his left (better) eye are atypical of any cataract I've seen with natural causes. . . .
>
> "All these things lead me to feel that he may well have experienced radiation effects harmful enough to his eyes which may well have had low resistance, to cause cataracts and the necessity to undergo surgery and aphakic lens wearing at an early age."

In a report dated January 22, 1979, Dr. Hook noted further that he concurred "in most of the comments made by Dr. Zaret" in Dr. Zaret's June 1, 1978 report, and he added that a cause and effect relationship was established from the "highly selective" incidence of four or five other controllers having cataracts at an early age.

Also submitted in support of appellant's claim was a March 14, 1980 position statement reviewing the pertinent research [1] from Albert P. Sheppard, Ph.D., a microwave consultant. Dr. Sheppard noted the following:

> "Lower level microwave radiation very likely produces microscopic lens changes which over the long term accelerate the aging process and thereby create a statistically significant higher incidence of cataract formation in the human eye than would be experienced by people who are not occupationally exposed to microwaves.
>
> "Currently, the FAA takes considerable care to isolate and protect controllers and other equipment operators from hazardous levels of microwave radiation. However, little evidence exists to ensure any confidence that this has historically been the case. In fact, [some evidence] indicates minimal care [was not] exerted until the 1970's. Measurements on FAA equipment do not address equipment operating conditions prior to the mid-seventies.
>
> "Diagnosis of microwave induced cataracts is a highly controversial physiological observation. In no way, however, does this weaken the idea that microwaves accelerate the aging of the eye making it more susceptible to early cataract formation."

In a clarifying letter dated October 14, 1981, Dr. Sheppard asserted the following:

> "There is every reason to believe that cases of prolonged and continuous (daily) microwave exposure levels, even below the C95.1 standard of 10 milliwatts per square centimeter, can appreciably accelerate the aging process of the eye, thereby enhancing susceptibility to cataractogenic difficulties. . . . [In tracing] the origins of U.S. safety standards for microwaves . . . one cannot help but conclude that the C95.1 standard is based strongly on the operational requirements of the

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[1] Among the articles reviewed was the article co-written and submitted by Dr. Zaret as well as an article by Dr. Budd Appleton, a Board-certified ophthamologist, who chaired a panel of specialists who were subsequently convened for this case. Dr. Sheppard noted that Dr. Zaret's arguments appeared with as much validity as those of Dr. Appleton who strongly refuted the existence of distinct, microwave induced cataracts as claimed by Dr. Zaret. It was also suggested that for the purposes of pursuing legal objectives, appellant should seek the opinions of various other doctors who concurred in varying degrees with Dr. Zaret in lieu of the "scientific antipathy" of Drs. Appleton and Zaret. Dr. Sheppard also noted internal inconsistencies in Dr. Appleton's data and conclusions, but Dr. Appleton responded on April 8, 1981 that Dr. Sheppard ignored the fact that the article reviewed was based on research in progress and that the data as subsequently completed supported the conclusions originally asserted in that article.

> military and microwave equipment manufacturers rather than on a level that is certain to protect people such as the air traffic control personnel. . . . The fact that the Communist Bloc countries have exposure standards below the one milliwatt per square centimeter level for their personnel is one of the rare if not unique instances where those countries have shown any inclination to better protecting their workers than those countries of the West. In short, it is my opinion that repeated exposure to microwave radiation at levels even below ten milliwatts per square centimeter can accelerate the eye aging process."

On September 15, 1981, the Office of Workers' Compensation Programs requested a summary and evaluation of current research from John C. Villforth, Director of the Bureau of Radiological Health of the Food and Drug Administration. In a response dated November 9, 1981, Mr. Villforth noted the following:

> "The bulk of available evidence does not show a positive correlation between microwave exposure and eye effects. Only a few cataracts have been documented well enough to lead to general acceptance of a diagnosis of microwave cataract. These have occurred following probable exposure to high intensity fields. Dr. Zaret, on the other hand, has reported cases which he attributes to prolonged exposure to low level microwave radiation. It is yet to be established that such cases are microwave-induced cataracts rather than cataracts of undetermined origin occurring in persons exposed to microwaves or some other part of the electromagnetic spectrum.
>
> "Current evidence suggests that minor lens lesions are not being found excessively in persons working with microwaves. Further, the significance of such minor lens defects is not really understood; it is possible, as some suggest, that they are precursors of cataracts but this has not been proven."

He added: "there are neither human nor experimental data that indicate that levels in the ANSI standard [10 milliwatts per square centimeter or less for microwave] are associated with cataract induction."

By letter dated August 12, 1983, the Office noted that sufficient information had been obtained from appellant and the employing establishment to prepare a statement of accepted facts which was being sent to an Office medical adviser for an opinion on causal relation. The Office also noted that appellant's previously submitted medical evidence would be considered of diminished probative value as none of it was based on the accepted exposure history, and appellant was advised that he could submit additional medical evidence to further support his *prima facie* claim.

By letter dated September 2, 1983, appellant, through counsel, informed the Office that he did not expect to submit additional medical evidence and appellant reiterated that despite the statement of accepted facts, no adequate evidence was available to determine appellant's exposure prior to 1975 as indicated by Dr. Sheppard. Appellant also disagreed with the statement of accepted facts in one respect by noting that he worked in a wood structure for a portion of his employment whereas the statement of accepted facts had noted that steel and concrete in the work structures would have shielded appellant and absorbed microwaves.

On January 3, 1984, Dr. Robert P. Kling, a Board-certified ophthamologist serving as Office medical adviser, reviewed the case record and noted that no evidence had been presented to establish that appellant was unusually sensitive to the effects of radiation and that a "radiation cataract" was not a clinically acceptable entity.

Dr. Kling also compared all the reports of appellant's clinical findings and pointed out an inconsistency. He noted that Dr. Sullivan's description (a posterior sub-capsular cataract in the superior nasal quadrant of appellant's right lens), Dr. Cabanas' description (a posterior cortical localized nasal cataract in the right eye), and Dr. Hook's description were all comparable and contradicted Dr. Zaret's report that he found a posterior capsular cataract. He also noted the following:

> "Dr. Hook left the posterior capsule in place when he operated upon Mr. Armbruster. After the operation, Mr. Armbruster saw 20/20 and Dr. Hook repeatedly describes the capsule as 'clear'. Either Dr. Hook or Dr. Zaret has to be mistaken. Mr. Armbruster, by reading the 20/20 line on the vision chart, seems to support Dr. Hook's claim that the posterior capsule is clear . . . Since the 'findings' of Dr. Zaret are not consistent with the findings of the other three doctors, . . . [or] with the patient's post-operative visual acuity, I would recommend that they be considered no further, and that the other doctor's findings be considered as probably correct."

Concerning the origin of the type of cataract appellant had, Dr. Kling stated that "posterior cortical cataract can be caused by any of numerous causes. There is no way for anyone to identify the cause or causes of any particular cortical cataract with certainty."

Dr. Kling also addressed the reasoning by which Dr. Zaret had ruled out all other causes for appellant's cataracts except radiant energy exposure. He pointed out that every statement in Dr. Zaret's reasoning was false: "Metabolic and senile cataracts commonly are not bilaterally symmetrical. Patients with peripheral uveitis commonly are completely unaware that they have ever had uveitis. Rosette form and polychromatic granules on the outer surface are the exception rather than the rule."

Regarding appellant's age, Dr. Kling noted the following:

> "Rarely do we prove beyond reasonable doubt the cause of any patient's cataract. An exception to that generalization is the traumatic cataract which develops within hours . . . after a penetrating injury to a previously healthy eye. . . . When we find a cataract in a patient who is only 41, we are surprised, and we search for possible causes. . . . If we discover no such interesting history, then we simply admit that we do not know the cause. . . . In clinical practice, it is not uncommon to be unable to find any 'explanation' for those cataracts which occur in young patients."

Dr. Kling also compared appellant's accepted exposure levels according to the statement of facts to the source data for them and noted that "by necessity some assumptions are made; and in every case, the assumption is identified, and it leads to an over-estimate of exposure. In some cases it leads to an enormous over-estimate. Even so, it is not possible to establish any exposure above the allowable dose." After noting that the accepted levels were not enough to produce a rise in temperature, he stated, "In this specific [case], it has been clearly shown that thermal damage to [appellant's] lenses is not a possibility." Dr. Kling then outlined a physical mechanism whereby microwave energy density less than 10 milliwatts per square centimeter might conceivably cause human cataract and then evaluated it: "This whole line of reasoning involves a lot of speculation, supposition, and imagination; there is no experimental evidence that such an event has ever occurred." He then stated his opinion that appellant's eye condition was not related to occupational radiation exposure and elaborated as follows:

> "Despite the plethora of speculation, the fact remains that no one has yet demonstrated a human cataract caused by ionizing radiation at less than 200 rads or by microwave radiation at energy density less than 10 milliwatts per square centimeter."

On Dr. Sheppard's conflicting position, Dr. Kling noted the following:

> "If indeed there is every reason ('to believe that prolonged and continuous microwave exposure levels even below 10 milliwatts per square centimeter can accelerate the aging process of the eye') then surely [Dr. Sheppard] could have cited several, based on good scientific studies and experiments. He did not cite even one. Despite extensive reading, I have not discovered one. I would agree there is always good reason to keep an open mind to all sorts of possibilities, but thus far, the evidence has not been presented."

Dr. Kling also questioned the credibility of Dr. Zaret's work in general [2] and noted that there is no convincing scientific literature to support the "much lower" allowable doses in countries of Eastern Europe and Asia. He also noted that a recent study by the National Academy of Science-National Research Council found no need to change the allowable limits in this country.

By letter dated February 23, 1984, the Office noted that there was a conflict in the medical evidence and referred appellant to Dr. Sidney Lerman, a Board-certified ophthamologist, for an examination and opinion to resolve the conflict. In accordance with appellant's request, the Office also instructed Dr. Lerman to determine a percentage representative of appellant's permanent visual impairment in accordance with the AMA *Guides to the Evaluation of Permanent Impairment* (2nd edition) should Dr. Lerman find that such impairment was causally related to appellant's occupational exposure.

In a report dated April 2, 1984 Dr. Lerman noted that "if one precludes [appellant's] ocular problems, there are no other indications that Mr. Armbruster may be unusually sensitive." Further, "there is frequently no demonstrable etiology in patients who develop cataracts at a relatively early age," and "although many ophthalmologists still believe that 'radiation cataracts' have pathognomonic slit lamp characteristics, one cannot really establish such a diagnosis on purely morphologic grounds; many other types of cataract can and do present with the so-called appearance of radiation cataracts."

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[2] The record contains a copy of a motion to dismiss a civil suit on behalf of the unrelated plaintiffs in that suit on the grounds that their entire case rested upon the expert testimony of Dr. Zaret to establish that they sustained cataract injuries as a result of defects and energy leakages in microwave ovens at their work; the motion asks for dismissal and notes that Dr. Zaret notified the plaintiffs in 1975 that he would no longer testify nor support his claims on their behalf.

Dr. Lerman then speculated that several different types of radiation experienced simultaneously might act synergistically, producing a greater combined effect than they could individually, and stated for this reason that, "it is thus not possible to evaluate the role of low level (less than 10 milliwatts per square centimeter) microwave radiation at this time." He concluded by noting that he was unable to give an opinion on causal relationship because he felt that the exposure history provided him was incomplete in that it lacked dosage data on nonionizing as well as ionizing radiation which could act together on a cumulative basis. Accordingly, he also noted that reference to the AMA *Guides* was unnecessary.

By letter dated August 6, 1984, the Office noted that since the statement of accepted facts represented the best possible reconstruction of appellant's exposure history, no follow-up with Dr. Lerman would appear useful or warranted. It was also noted that deficiencies in the understanding of appellant's exposure history had been acknowledged in the statement of accepted facts. Accordingly, the Office referred the case record for review by a "Radiation Expert Medical Panel" chaired by Dr. Budd Appleton, a Board-certified ophthalmologist, along with a series of questions to be answered with regard to the circumstances of appellant's case.

In a composite panel report dated July 8, 1985, Dr. Appleton noted the following:

> "According to a 1984 survey approximately 16 percent of three hundred consecutive cataract operations in a major metropolitan medical center were in patients age 45 and under. Hence there is no merit to the claim that Mr. Armbruster is too young to have cataracts of natural occurrence and they therefore must have been caused by radiation."

He noted further that most age-related cataracts eventually manifest bilaterally, but generally begin in one eye while the other may remain uninvolved for long periods; a cataract in one eye only is commonly caused by monocular inflammation, degeneration or injury. Dr. Appleton then added that appellant's clinical pattern of cataract was not characteristic of any one particular type or etiology. Based on these facts, the Panel concluded, "there is no merit to the claim that because he has a unilateral cataract which is not otherwise explained it must have been caused by radiation."

The panel also discounted the isolated case reports of human cataract due to nonionizing radiation: "In none of these reports is exposure to nonionizing radiation documented, and in several of them the cause of the cataract is obviously something else." They concluded from this that no valid scientific basis exists for the affirmations of causal relationship to nonionizing radiation in Mr. Armbruster's case.

Regarding Mr. Armbruster's accepted levels of exposure, the Panel noted that the assumptions made had resulted in overestimates, yet still "the field strength under consideration in this case is still only one thousandth of the level required to induce a minimal sensation of warmth." For ionizing radiation, "the dose the claimant received represents about one fifth of the additionally naturally occurring background ionizing radiation Mr. Armbruster would have received had he chosen to live in Denver rather than Cleveland for one year." For these reasons, the Panel negated a causal relation of the cataract to radiation.

For the pigmented line on the left lens, the panel stated that it did not appear to be a significant abnormality. They presented several theories about how this type of finding develops, consistent with ocular embryology, anatomy, and pathophysiology, but indicated there was no evidence for ascribing the phenomenon to radiation.

By an internal memorandum dated November 29, 1985, the Office noted that the panel report needed clarification, and by memorandum dated November 30, 1985, the Office requested that the panel assess the causal relationship between appellant's eye condition and ionizing radiation as opposed to nonionizing radiation.

By compensation order dated June 30, 1986, the Office rejected appellant's claim finding that the weight of the medical evidence negated causal relationship between appellant's eye conditions and factors of his employment. In an attached memorandum, the Office noted that certain inaccuracies in Dr. Zaret's report diminished its probative value and that Dr. Hook's reports were not based on any history of appellant's actual exposure. The Office also noted that various opinions resting upon the fact of appellant's youth and his alleged special sensitivity to radiation were unsupported by the evidence and effectively opposed by other medical opinion evidence, including the reports of Dr. Kling and the Radiation Panel which together constituted the weight of the medical evidence.

The Board finds that the case is not in posture for decision.

A conflict in the medical evidence existed between Dr. Zaret and Dr. Hook on the one side and the Office medical adviser, Dr. Kling, on the other. Dr. Zaret, a Board-certified ophthalmologist, and Dr. Hook, also a Board-certified ophthalmologist and appellant's treating physician, ruled out other known causes of cataracts by the absence of their normal physical characteristics and concluded that the only remaining cause for cataracts with the characteristics of appellant's was radiant energy exposure. Both noted that such may occur given the cumulative effect of exposure to various wave lengths of ionizing and nonionizing radiation which appellant would likely have faced in his employment but which were not completely documented by the employing establishment. Dr. Kling disputed this analysis and questioned Dr. Zaret's procedure of ruling out alternative causes of cataracts due to the absence of their normal physical characteristics. He also stated that the exposure levels subsequently developed in the statement of accepted facts represented an overestimate and that even given this overestimate, any line of reasoning establishing a causal relationship would involve a lot of speculation, supposition, and imagination, given the current research in this field. Accordingly, the Office specifically recognized this conflict in the medical evidence and referred appellant to Dr. Lerman to resolve it. This was further evidenced by the fact that the letters sent to appellant and Dr. Lerman by the claims examiner noted that the examination was to be conducted by Dr. Lerman to resolve the conflict in medical opinion.

At oral argument before the Board, the Director contended that no conflict in medical evidence ever existed in the medical evidence and that the Office had mistakenly "found" a conflict in the medical evidence; that the reports of Dr. Zaret and Dr. Hook were not of equal weight with the report of Dr. Kling to create a conflict since their reports were not based on the accepted exposure history and were instead based only upon assumptions of exposure made by the doctors and that the report of the panel together with the report of Dr. Kling represented the weight of the medical evidence and establishes that appellant's cataract condition is not causally related to factors of his employment.

The Board finds the Director's contentions to be unpersuasive and without merit. In this connection, the statement of accepted facts and the report of Dr. Sheppard, the microwave consultant, reveal that appellant's exposure history was incomplete with regard to his exposure prior to 1975 to various nonionizing radiation wavelengths acting in concert with exposure to ionizing radiation during the same time period.

The reports of Dr. Zaret and Dr. Hook were based in part on their experience and assumptions regarding the missing data pertaining to both ionizing and nonionizing radiation and its cumulative effect on appellant. The Board does not find the reports of Drs. Zaret and Hook to be of less probative value than the reports of Dr. Kling because they were not based exclusively on the exposure history contained in the statement of accepted facts. Accordingly, the Board concludes that the Office properly declared a conflict and referred the appellant, the case record together with a statement of accepted facts, to Dr. Lerman for an examination and opinion pursuant to section 8123 of the Act.

After the Office received Dr. Lerman's impartial opinion and subsequently determined that Dr. Lerman was unable to resolve the conflict because of the inadequate exposure history data with respect to both ionizing and nonionizing radiation and its cumulative effects on appellant's cataract condition, the Office was required to follow the same procedure for the selection of a second impartial medical specialist and refer appellant the case record and statement of accepted facts, for an examination and opinion as to whether his cataract condition was causally related to radiation exposure in his federal employment.[3]

In the instant case, after the Office correctly determined that Dr. Lerman was unable to resolve the conflict in medical opinion evidence, the Office erred in referring the case record to the radiation panel for a referral report on the issue of whether appellant's cataract condition is causally related to radiation exposure in his federal employment.

The report of the radiation panel, chaired by Dr. Appleton, constitutes an improperly acquired medical report since it was not obtained for the purpose of resolving a conflict in medical evidence pursuant to section 8123(a) of the Act.

In *Carlton Owens,*[4] the Board held that when the Office secures an opinion from an impartial medical specialist to resolve a conflict in the medical evidence, it is improper to send the appellant to another medical specialist without sufficient reason or justification. Such an action is open to the suspicion that the Office shopped around for the purpose of securing a medical opinion favorable to its view.

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[3] *Harold Travis,* 30 ECAB 1071 (1979).

[4] 36 ECAB 608 (1985).

Accordingly, since the original conflict in medical evidence remains unresolved, the Office shall refer appellant and the case record to an appropriate impartial specialist for examination and opinion to resolve the conflict in medical evidence. After such further development as it may find necessary, the Office shall issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated June 30, 1986 is set aside and the case remanded for further action not inconsistent with this decision of the Board.

In the Matter of POPE D. COX *and* DEPARTMENT OF AGRICULTURE, SOIL CONSERVATION SERVICE, Shawnee, Okla.

Docket No. 87-814; Submitted on the Record;
Issued October 30, 1987

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly found that appellant could perform the duties of a leasing manager and therefore did not have a loss of wage-earning capacity.

On November 2, 1966 appellant, then a 61-year-old auger drill operator, was attempting to dig out an auger bit when he developed back pain. Appellant stopped working the next day and did not return.

The Office of Workers' Compensation Programs paid temporary total disability compensation through March 28, 1967. In a May 27, 1968 letter the Office accepted appellant's claim for permanent aggravation of preexisting degenerative disc disease with herniated intervertebral disc. In a June 18, 1968 letter, the Office informed appellant that he was being placed on the automatic roll for compensation payments, effective June 6, 1968.[1] The Office noted that appellant had several disabilities unrelated to his employment injury including gout, hypertension and retinopathy.[2]

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[1] The record does not show whether appellant received compensation between March 28, 1967 and June 6, 1968.

[2] In an October 4, 1966 report, Dr. D. W. McCauley stated that ophthalmoscopic examination showed a marked silver wire effect on the arteries.

In a January 29, 1981 letter, the Office requested that appellant report his income for the prior 12 months. The Office repeated its request in a March 18, 1981 letter. In a March 21, 1981 response, appellant indicated that he was self-employed from January 1, 1980 to December 31, 1980 working approximately one hour a day as a supervisor. He reported his rate of pay as $3,600.00 annually.

In an April 3, 1981 letter the Office requested from appellant a more precise description of the kind of work he was performing. In a July 14, 1981 letter, appellant stated that he received $3,600.00 by transferring an oil and gas lease on which he made an agreement to hold an overriding royalty and receive $300.00 a month. He indicated that the lease agreement classified this payment as a monthly supervisor fee. He stated that he did not perform physical labor for the income. He commented that he owned a partial working interest in other oil and gas leases, operated by Clara Production Company, a corporation in which he owned one fourth of the stock.

In a November 7, 1981 letter, the Office again requested a statement of appellant's income for the prior 12 months. The Office made a second request on June 3, 1982. In a June 22, 1982 response appellant indicated that he was self-employed from January 1, 1981 through June 22, 1982 in the supervision of drilling and operation of oil and gas wells. He submitted a copy of his 1981 income tax form showing that he had a gross income of $80,033.17. He described $16,635.00 as other income from "supervision and pumper."

In a February 24, 1983 letter the Office requested that appellant report all employment and earnings for the prior 12 months. The Office repeated its request in an April 26, 1983 letter. The Office suspended appellant's compensation effective June 16, 1983 for failure to submit the requested information.

In an August 11, 1983 letter, the Office again requested that appellant report his employment and earnings for the prior 12 months. In an August 15, 1983 response appellant indicated that he was self-employed from January 1, 1982 to December 31, 1982 and earned $42,500.00 from a working interest in oil and gas wells.

In an August 17, 1983 report, Dr. Terrell Covington, Jr. indicated that appellant was hospitalized from June 15 to June 30, 1983 for coronary insufficiency and had undergone coronary bypass surgery. He diagnosed moderate hypertensive vascular disease controlled with medication. In an October 19, 1983 report, Dr. Covington indicated that he had followed appellant as a patient since 1970 and had treated him since that time for mild hypertension.

In a February 2, 1984 decision, the Office terminated appellant's compensation effective June 16, 1983 because he had no loss of wage-earning capacity.

Appellant requested a hearing before an Office hearing representative. In an April 4, 1984 letter, a representative of appellant stated that he had been informed that the $42,500.00 income appellant reported was not personal or earned income but income of a company, Pope D. Cox, Incorporated. He indicated that appellant wished to file an amended report showing this income as company income.

In a July 31, 1984 decision, an Office hearing representative noted that the Board, in *Vernon Booth*[3] stated that income on profits from business are not generally held to be the fruits of wage-earning capacity but a return on investment. The Board indicated that where the source of income can be differentiated between profit and the product of appellant's work any portion of the income directly traceable to such work could be considered as if it were wages. The wages could then be used to determine rate of compensation if they fairly and reasonably represented the employee's wage-earning capacity. The Board stated that if an employee was actually performing duties in the business it might be possible to determine, by obtaining evidence as to the prevailing rate of pay for others employed to perform similar duties, the portion of the business profit directly traceable to the employee's work. The hearing representative indicated that the representative's April 4, 1984 letter suggested that a situation similar to *Booth* existed in appellant's case. He stated that the Office should obtain such further evidence as it deemed necessary to determine appellant's wage-earning capacity in accordance with the applicable law and principles and then issue a *de novo* decision. The hearing representative vacated the Office February 2, 1984 decision.

In an August 30, 1984 two-way memorandum, the Office requested that appellant submitted further information on whether he performed substantial services in order to realize his income.

In an October 1, 1984 affidavit, appellant indicated that since the employment injury he had developed heart disease necessitating surgery and had lost sight in his eyes. He stated that he supervised the production of oil and gas wells to the extent that his son, an employee, reported to him "the status, problems and circumstances of such undertaking and upon such information provided by him, I directed him to take such action as I determine appropriate." Appellant indicated that he did not perform any paper work or record keeping but had an accounting firm perform such work. He reported that he did not make any on-site inspections and did not supervise a crew. Appellant stated that the most important factors contributing to his success in business were his judgment in determining sites for obtaining production, purchasing leases for such sites, securing investors for development of such leases and securing drilling contractors for the actual drilling and completion of oil and gas wells on the selected sites. Appellant reported that except for his son's services, for which he was paid a salary, all other activity on behalf of his business was performed by others under contract for such services.

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[3] 7 ECAB 209 (1954).

In a November 6, 1984 letter, the Office stated that appellant supervised production efforts to the extent that he was actively engaged in making decisions, analyzing problems and directing corrective efforts. The Office indicated that this activity clearly showed that appellant was performing substantial services. It concluded that it would be incorrect to assume that the income from appellant's oil and gas wells was strictly investment income because appellant's active role showed that the income was not passive. The Office requested what a person with appellant's skills would be called and how much would be paid to perform the duties he described. In a February 19, 1985 letter appellant's attorney stated that appellant was totally and permanently disabled and therefore entitled to benefits under 5 U.S.C. section 8105(a). He contended that the request for information concerning wages of a person with duties similar to appellant was irrelevant because it applied only to benefits payable for partial disability under 5 U.S.C. section 8106. He suggested "investor" as a job title for appellant for which no wages would be paid as his income would be determined by his investments.

In an April 16, 1985 letter, the Office reiterated its conclusion that the evidence record showed that appellant directed his business, paid salaries and contracted for services. It indicated that the duties of appellant were not those of an investor but those of an owner manager. The Office repeated its request for information on the rate of pay appellant would pay for someone to perform his management duties for each year since 1980.

In a May 15, 1985 letter, appellant's attorney contended that the Office's request was not relevant. In a July 12, 1985 letter, the Office requested information on the salary appellant paid his son to perform duties that appellant was not able to do himself. In a July 19, 1985 letter, appellant's attorney indicated that appellant's son was paid $2,000.00 a month by his employer, P.D. Cox, Inc., of which appellant was president.

In a June 2, 1986 decision the Office found that appellant qualified for the position of supervisor and pumper and therefore had no loss of wage-earning capacity.

Appellant requested a hearing before an Office hearing representative. At the October 7, 1986 hearing appellant's attorney contended that, under *U.S. v. Dorey*[4] the Office could not use information of alternative employment and wage-earning capacity because appellant was totally disabled and reports on wages and earnings were applicable only to claimants determined to be partially disabled. He stated that the medical evidence showed that appellant was totally disabled.

Appellant testified that the duties of a supervisor pumper in an oil field would be hooking up tanks, laying lines, digging ditches, and operating, maintaining, and driving machinery. Appellant stated that he had been unable to perform those duties since he retired. He indicated that he was able to see only three to four inches beyond his nose. He stated that his involvement in oil field activities was strictly an investment. He testified that he relied on his son to write and sign checks and perform all other activities. Appellant stated that his only involvement in the business was to buy leases and pay for other firms to perform drilling. He indicated that he did not go out to the job site. He stated that his son performed most of the duties. He commented that he went to the office of the business approximately twice a week just to pass the time. Appellant's son testified that to drill an oil well, a person had to complete a drill permit to be approved by the state. After the state approved the permit, copies were sent to contractors who would submit bids for the drilling. One contractor would be selected to perform the drilling. Appellant's son stated that he made the management decisions and supervised employees. He indicated that he was accountable to his father. He stated that his father was unable to perform any of the physical labor associated with the business. He testified that charges for supervision listed on the bills sent by the company could have been listed as an operator's fee.

In a December 3, 1986 decision, the Office hearing representative found that appellant's activities as described in his October 1, 1984 affidavit showed an active participation in the company business and not a mere passive investment of capital. He found that the

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[4] 711 F. 2d 125 (9th Cir 1983).

Office improperly based appellant's wage-earning capacity on the salary paid to his son because the record shows that appellant's son performed all the necessary on-site supervision and physical work. He stated that the job of leasing manager [5] closely matched the employment activities performed by appellant. The hearing representative stated that an Office rehabilitation specialist indicated that the starting salary of a leasing manager ranged from $20,000.00 to $23,000.00 a year. He calculated on the basis of the *Shadrick* [6] formula that appellant had no loss of wage-earning capacity and therefore had no further entitlement to compensation for wage loss. He also stated that as appellant's loss of sight in both eyes occurred after the November 2, 1966 employment injury and no evidence related it to the employment injury, there was no requirement that the office consider the loss of sight in determining appellant's lose of wage-earning capacity.

The Board finds that the Office improperly determined appellant's loss of wage-earning capacity.

Under the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, or the employee does not have any actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.[7]

In *Booth* the Board held that income from business profits are not generally held to be the fruits of wage-earning capacity but of investment. A return on investment cannot be considered as if it were wages. If the source of the income can be differentiated as representing either profit or the product of the employee's work, any portion of the income directly traceable to such work may be considered as if it were wages and can be used in determining a wage-earning capacity if they fairly and reasonable represent the injured employee's wage-earning capacity.

In this case, it cannot be determined whether appellant's income since January 1, 1980 can properly be considered wages. Appellant's corporation engages in buying leases and hiring drilling crews to work on them. The record is unclear on the specific nature of appellant's participation in the business. He initially indicated that in 1980, he received $300.00 a month in an agreement to hold an overriding royalty on a lease. The payment was considered a monthly supervision fee. There is no indication, however, that appellant performed any actual supervision. In his 1981 income tax form, he listed part of his income as from supervision and pumper. Appellant did not state what the duties of this position required and did not indicate whether he performed those duties. In his August 15, 1983 statement, appellant indicated that he earned $42,500.00 from a working interest in oil and gas wells. This statement would suggest that the income came from investments in oil and gas wells and not from the product of his work. This conclusion is supported by the April 4, 1984 letter from appellant's representative.

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[5] Department of Labor, Dictionary of Occupational Titles, Code No. 186.117-046.

[6] *Albert C. Shadrick*, 5 ECAB 376 (1953).

[7] 5 U.S.C. section 8115.

In the October 1, 1984 affidavit, appellant indicated that his supervision of the company consisted of receiving reports from his son, an employee of the corporation, and directing him to take appropriate actions. He stated that he did not perform any paper work, conduct on-site inspections or supervise a crew. Appellant indicated that he used judgment in selecting sites for drilling, obtaining leases for the sites, securing investors and hiring drilling crews. Appellant's description of his duties would show that he performed an active role in managing the corporation. At the hearing appellant indicated that he could not perform the physical duties of supervisor and pumper. His son performed those duties. Appellant stated that he only made investments by buying leases and paying for drilling crews. He relied on his son to perform the other duties, including writing checks. He testified that he went to the corporation's offices twice a week to pass the time. Appellant's son described how a drilling crew was hired and indicated that the supervision for which payment was made was in essence an operator's fee or a royalty payment. Therefore the testimony at the hearing leaves it unclear whether appellant or his son performed the actual duties of managing the corporation, by selecting drilling sites and hiring drilling crews and whether the income appellant received was the result of his management of the corporation or represented a return on the investment he made in drilling leases. The evidence therefore is insufficient to differentiate appellant's income between profits and the product of his work.

In *Booth*, the Board held that when actual earnings did not fairly and reasonably represent appellant's wage-earning capacity, the Office was to use the other provisions under 5 U.S.C. section

8115 to determine appellant's wage-earning capacity. The Board stated:

> "With reference to the procedure to be followed, it would appear that the most reasonable determination of appellant's wage-earning capacity would require that contact be made with officials of the Vocational Rehabilitation Service or other persons familiar with the general labor market for the purpose of determining the type of work for which appellant qualifies by aptitude and training. Such persons could, after taking into account appellant's physical condition coupled with his testimony as to how his physical condition affects his ability to perform the various duties pertaining to work for which he is found to be qualified, testify what jobs (with rate of pay) would be available to appellant in the open labor market, if his present favorable circumstances should cease to exist, and whether such employment would be regular and continuous or otherwise.[8]

The procedure described by the Board in *Booth* is the standard procedure for determining loss of wage-earning capacity.

The Office hearing representative found that the position that come closest to the duties appellant described in his October 1, 1984 affidavit was that of a leasing manager. The hearing representative, however did not follow the procedures necessary to determine a wage-earning capacity. The position of leasing manager is available on the open labor market. The hearing representative, however, did not determine whether appellant had the physical ability perform the duties of a leasing manager taking into account his employment-related condition and any preexisting conditions. The hearing representative also did not determine whether the position was reasonably available within appellant's commuting area. The case must therefore be remanded for a proper determination of appellant's loss of wage-earning capacity.[9]

The hearing representative found that appellant's loss of sight was not related to his employment injury and did not preexist his employment injury. An October 4, 1966 medical report, however, indicated that appellant had a marked "silver wire" effect on the arteries of his eyes. This finding was made one month prior to appellant's accepted employment injury. The Office, in accepting the claim, noted that appellant had hypertension and retinopathy which was unrelated to his employment injury. Appellant was hospitalized in June 1983 for coronary insufficiency and coronary bypass surgery. The record should be developed further to determine whether appellant's hypertension and retinopathy preexisted the November 3, 1966 employment injury and whether appellant's coronary condition and loss of sight were the result of the natural progression of the preexisting conditions. The Office should then determine whether these conditions should be taken into account in determining appellant's loss of wage-earning capacity.

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[8] 7 ECAB at 212.

[9] In view of the Board's disposition of the case, it is unnecessary to discuss the argument of appellant's attorney on the application of *U. S. v. Dorey* to this case. The Board notes, however that it has previously found that *U. S. v. Dorey* does not apply to administrative proceedings under the Federal Employees' Compensation Act. *See Elbridge H. Wright*, 36 ECAB 691 (1985).

The decision of the Office of Workers' Compensation Programs, dated December 3, 1986, is hereby set aside and the case remanded for further action in accordance with this decision.

In the Matter of DANIEL A. DAVIS *and* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Baltimore, Md.

Docket No. 87-1014; Submitted on the Record;
Issued October 30, 1987

Before GEORGE E. RIVERS, DAVID S. GERSON, MICHELE VON KELSCH

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant had a temporary employment-related aggravation of a preexisting emotional condition which ceased in June of 1973.

On February 8, 1973 appellant, then a 41-year-old air traffic control specialist, filed a claim in which he alleged that he had sustained injury to his "stomach, liver, nerves" which he attributed to a 16-year history of employment-related stress. Appellant was found medically disqualified from performing his regular duties on January 17, 1973 and was reassigned to an administrative position.

In support of his claim, appellant submitted reports dated January 4, 1973 and April 12, 1973 from Dr. Max J. Miller, a Board-certified internist. Dr. Miller stated that he first treated appellant on March 3, 1969 for chest pains and numbness on the left side and that appellant had admitted to being a heavy drinker for several years. On physical examination, appellant's liver was found to be enlarged below the right costal margin. A subsequent examination on March 20, 1972 found further enlargement of the liver in the left upper quadrant. Dr. Miller stated that he advised appellant to stop drinking. On October 10, 1972 appellant was seen for complaints of epigastric pain, indigestion and vomiting. Appellant admitted to still drinking about a half a fifth a day and his liver was found to be enlarged. Dr. Miller noted that he started appellant on medication to withdraw appellant from alcohol use and noted that appellant's job as an air traffic controller contributed to appellant's drinking as a reaction to stress on the job. Appellant was hospitalized by Dr. Miller on March 15, 1973 and underwent treatment for acute gastritis with heatemesis, chronic acid peptic disease, cirrhosis of the liver, and psychiatric referral for alcohol rehabilitation.

In response to an Office of Workers' Compensation Programs request for further evidence in support of his claim, appellant submitted the June 5, 1973 report of Dr. Ramon A. Salas, a psychiatrist. Dr. Salas stated that he consulted with appellant on referral of Dr. Miller and that appellant described the hectic conditions of his shift at work and the responsibility involved in decision making situations in the course of his employment. Dr. Salas noted that appellant became uptight toward the end of his work day and started using alcohol as a tranquilizer. Dr. Salas stated that he treated appellant and that appellant underwent a detoxification hospitalization followed by continued bi-monthly psychiatric treatment. Dr. Salas diagnosed a reactive depression associated with heavy alcohol intake, presently in remission, and related appellant's condition to his federal employment.

On June 28, 1973 an Office medical adviser reviewed the record and stated that appellant's medical condition was associated with chronic alcoholism and concluded the claim should be denied under 5 U.S.C. section 8102(a)(3).[1]

By compensation order dated July 30, 1973 the Office rejected appellant's claim finding that appellant's condition was caused by his intoxication and not caused by any condition of his federal employment.

By letter dated October 26, 1973 appellant requested a hearing before an Office hearing representative. On January 14, 1974 the Office hearing representative referred the record to a second Office medical adviser to review the medical evidence and comment on whether the case was in posture for decision. On January 25, 1974 the second Office medical adviser noted that the first Office medical adviser did not consider alcoholism as a possible disease caused by employment.

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[1] 5 U.S.C. section 8102(a)(3) provides: "The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of duty unless the injury or death is proximately caused by the intoxication of the injured employee."

By compensation order dated April 15, 1974 the Office vacated the July 30, 1973 decision. In an attached memorandum, the Office hearing representative noted that the district Office accepted that appellant's employment was one containing elements of stress and remanded the case for further development on whether appellant's chronic alcoholism was related to employment factors.

On remand, a third Office medical adviser reviewed the record and recommended a second opinion psychiatric referral. The Office thereafter referred appellant, together with the case record and a statement of accepted facts, to Dr. Wolfe N. Adler. By letter dated May 16, 1974 Dr. Adler declined examination of appellant. Appellant was referred to Dr. Jose R. Arizaga, who, by letter dated July 15, 1974, declined the Office referral.

On October 17, 1974 appellant was referred, together with the case record and a statement of accepted facts, to Dr. Frank J. Ayd, a Board-certified psychiatrist. In a report dated November 15, 1974 Dr. Ayd reviewed appellant's history of employment and medical treatment and noted that appellant first started drinking episodically at age 18. He noted that appellant related a history of drinking "just as much when off work for weekends and holidays and during his vacations as he did on working days." He noted that appellant had abstained from alcohol consumption for several months in 1973 but started drinking again fairly heavily. Dr. Ayd stated:

> "A careful review of Mr. Davis' affective status since childhood did not uncover any evidence that this man suffers from any affective disorder. Likewise, I could not elicit any symptoms that would justify diagnosing him a victim of any form of psychoneuroses. Nor can he be called a sociopath. In my professional opinion, Mr. Davis' condition is chronic alcoholism. Whether this is genetically determined I cannot say, but the history of paternal alcoholism suggests that this may be a possibility.
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> After carefully considering all the data Mr. Davis gave me, it is my judgment that his employment as an air traffic controller was not responsible for his alcoholism. He believes it was but his pattern of drinking prior to and since his employment as an air traffic controller refutes this. . . ."

On November 20, 1974 the third Office medical adviser reviewed the record and concurred with the opinion of Dr. Ayd.

By compensation order dated May 15, 1975 the Office rejected appellant's claim finding that his alcoholism was not proximately caused by the conditions of his federal employment.

On April 22, 1976 appellant filed an application for review before the Board. By motion dated May 27, 1976 the Director of the Office requested that the Board remand the case for further development to resolve the conflict in medical opinion between Dr. Salas and Dr. Ayd. By order dated June 11, 1976 the Board granted the Director's motion.[2]

On remand, the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Elihu E. Allinson, a Board-certified psychiatrist. In a report dated January 31, 1977 Dr. Allinson stated that he saw appellant on four occasions and referred appellant for psychological testing to Dr. Shabse Kurland, a clinical psychologist, who obtained diagnostic test results. Dr. Allinson stated that he reviewed appellant's employment history and medical treatment and noted that during the course of the psychiatric interviews there was no evidence of hallucinations, delusions or other psychotic ideation. Dr. Allinson reviewed the findings on psychological testing and diagnosed obsessive compulsive personality (DSM II 301.4), alcoholism (DSM II 303), alcohol addiction with related stress (DSM II 303.2), and related cirrhosis by history (DSM II 303.9). Dr. Allinson stated:

> "It is further my impression that Mr. Davis' present disability, though not directly the result of stress at work, has clearly and unquestionably been aggravated and accelerated by those stresses, and that his continuing disability since January 17, 1973 is in fact proximately related to his employment."

On March 29, 1977 a fourth Office medical adviser reviewed Dr. Allinson's report and disagreed with his conclusion in favor of the opinion provided by Dr. Ayd. He noted that appellant had a long history of alcohol use and continued to drink despite Dr. Miller's warnings and in spite of being medically disqualified from his federal duties.

By memorandum dated October 7, 1977 the Office claims examiner requested that the fourth Office medical adviser further clarify his opinion. The medical adviser noted:

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[2] Docket No. 76-259 (issued June 11, 1976).

> "It is my opinion that the alcoholism and connected conditions (gastritis, cirrhosis, peptic ulcer and esophagitis) are in no way connected to his employment. In fact, all his conditions mentioned in the medical reports are preexisting. It may be accepted as aggravation pending a report from his internist or psychiatrist to determine whether it is temporary or permanent. If this is by aggravation, the source of aggravation is eliminated by his treatment."

By compensation order dated April 6, 1978 the Office rejected appellant's claim finding that "the claimant's physical conditions causing disability were not proximately caused by factors of employment." [3]

By letter dated May 3, 1978 appellant requested a hearing before an Office hearing representative. On January 29, 1980 appellant withdrew his request for a hearing in favor of reconsideration by the Office.

By compensation order dated October 6, 1980 the Office denied appellant's application for review, after reviewing the case on its merits, on the ground that no new evidence was submitted since the April 6, 1978 decision warranting modification of the prior decision.

On January 13, 1981 appellant filed an application for review with the Board. By order dated March 13, 1981 the Board remanded the case to the Office noting that the case had been referred to Dr. Allinson for resolution of a conflict in medical opinion and that Dr. Allinson did not provide adequate rationale to indicate how appellant's condition had been aggravated by job stress or why that aggravation had continued after appellant was removed from the work environment. The case was remanded to the Office to obtain a clarification from Dr. Allinson with regard to the relation between appellant's employment-related stress as an air traffic controller and the aggravation or acceleration of his alcoholic condition.

On remand, the Office requested Dr. Allinson to provide a supplemental medical report. In a memorandum dated December 4, 1981 an Office claims examiner noted that Dr. Allinson related in a phone conversation of that date that he would not respond to the Office's request for clarification of his medical report.

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[3] The record indicates that the Office claims examiner contacted representatives from several state employment programs for information concerning whether alcoholism was treated as related to employment or as a voluntary activity.

On July 22, 1982 the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. David H. Fram, a Board-certified psychiatrist with the Psychiatric Institute, for a new impartial medical evaluation. In a report dated November 24, 1982 Dr. Fram reviewed appellant's employment history and medical treatment and diagnosed chronic alcoholism. Dr. Fram stated:

> "It is my opinion that the alcoholism was not caused by the stresses at the job. I think it is true that the stress of working as an air traffic controller facilitated the development of the disorder. There is evidence from the record, however, that Mr. Davis did not pursue measures recommended to him at the time the disease was developing to stop his drinking and arrest the progression of the disease. Alcoholism, like other addictions, is a disorder different from many other medical disorders in that the afflicted person may voluntarily affect the course of the development of the disorder in a major way by taking measures to modify the drinking behavior. . . .
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> "To review the ten points asked to comment upon, it appears that in 1965 Mr. Davis definitely had a problem with alcohol abuse. This was manifest by a compulsive need to drink alcohol on a daily basis in order to deal with unpleasant emotions. There is little evidence that Mr. Davis attempted to stop, cut down or control his drinking. Recently he has been in treatment programs and has attended A.A. but currently is out of treatment and drinking heavily. The physical conditions noted, inflammation of the duodenum, cirrhosis of the liver, and chronic acid peptic ulcer disease without ulcer are not, in my opinion, independent of the alcoholism but rather are likely complications of the alcoholism. Mr. Davis has described further physical complications, namely impotency and neuropathy, which have more recently developed. I do not think there is a psychological disorder presently defineable apart from alcoholism. I do not know of a substantiated medical theory of etiology of alcoholism which yields standard indicators and the definitive procedure for determining if work stress is a contributing factor in a particular case. With regard to the voluntary or involuntary nature of alcoholism, it is evident from this discussion that it is both. Some people are undoubtedly more prone to develop alcoholism because of their physiological or psychological makeup. To this extent alcoholism is certainly an 'involuntary' disorder. On the other hand the development of

> this disorder can be markedly influenced by the individual's willingness to participate in treatment and restrain himself from following the natural tendency to continue the drinking. In this sense, the disorder may be controlled by the individual's voluntary cooperation. In general, stresses in an individual's life including the stress of working in a difficult occupation may aggravate the alcoholism. On the other hand, it is my view that it is incumbent on the individual to attempt to control his drinking, and that other people, including his employers, should not be held responsible for his decision not to. It is my opinion that Mr. Davis' job did not cause his alcoholism. It is my opinion further that although the stress of his job probably aggravated the problem, that other stresses, such as his wife's infidelity, have also aggravated the problem, and that Mr. Davis has not done what he could have done over the years to prevent the disorder from developing as it has. It appears that currently Mr. Davis is capable of doing the kind of work he does now, namely managing property. He certainly continues to be disabled for working as an air traffic controller."

By letter dated February 17, 1983 the Office requested Dr. Fram to clarify his report. In a report dated August 18, 1983 Dr. Fram stated:

> "It is my opinion that the effect of the stresses that may have occurred as a result of the work as an air traffic controller would be likely to outlast the actual temporal existence of the stress itself. It is well-known that the effect of stressful situations or traumatic events may continue past the actual existence of the stress. What then continues is a process that represents an amalgamation of the underlying previous condition and the stressful situation."

On March 7, 1984 a fifth Office medical adviser reviewed the record and stated that Dr. Fram's report was sufficient to establish that appellant had chronic alcoholism aggravated by employment-related stress. In a May 29, 1984 report, the fifth Office medical adviser noted:

> "[Appellant] is a gentleman with a preexisting and underlying psychological problem. Under job stresses the patient's alcoholism became disabling. The case was referred to an impartial medical examiner who feels that the job-related aggravation is

> permanent and is part of the patient's current psychological picture.
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> "The patient has refused alcohol rehabilitation programs because of denial or preferring to drink. The questions that arise from the voluntary decision: A. The patient is noncompliant with proper medical therapy. He has repeatedly refused medical help. Unlike surgery, alcohol rehabilitation does not involve any risk to life nor does it adversely affect the body as a myelogram might. It is benign and innocuous as a physical examination or a psychiatric interview. B. By continuing to drink, the patient is likely to experience numerous medical problems associated with alcoholism—alcoholic hepatitis, cirrhosis, peptic ulcer disease, alcoholic cardiomyopathy, pancreatitis, alcoholic-induced seizures, polyneuropathy, anemia, etc. Are we responsible for these conditions when a patient voluntarily drinks? C. In addition, an alcoholic is more likely to be involved in a motor vehicle accident involving loss of limb or life. Are we responsible for his death and that of other people?
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> "Medically, the case is clear. The patient has a permanent aggravation of a preexisting condition per our impartial medical specialist. However, noncompliance of reasonably safe medical therapy raises a point of Office responsibility."

By memorandum dated July 30, 1984 the Office claims examiner referred the case to the Office Deputy Associate Director to determine whether the condition of alcoholism should be accepted by the Office. By memorandum dated March 4, 1985 the Office Deputy Associate Director requested that the fifth Office medical adviser review the case file, indicated that he had found Dr. Fram's medical report to be inconsistent and unrationalized on the issue of employment-related aggravation, and noted: "If you still agree with Dr. Fram's conclusions, please address my concerns. If you do not, please provide a rationalized criticism of the report." By report dated March 6, 1985 the fifth Office medical adviser stated that appellant's employment did not cause appellant's alcoholism, that appellant stopped work at his federal job and was able to stop drinking for a time and that his return to alcohol consumption was related to his wife's infidelity, and disagreed with Dr. Fram's view that appellant's condition, ten years after retirement, was related to his former federal employment.

In an undated memorandum to the file, the Office noted that appellant would be referred to a new impartial medical specialist as Dr. Fram's original report was not well-rationalized and, after securing a second supplemental report from the physician, the Office determined that the report did not provide the necessary clarification to resolve the issue in question.

The Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Alan J. Romanoski, a Board-certified psychiatrist. The Office provided Dr. Romanoski with a list of questions to be resolved and amended the statement of accepted facts to include information on appellant's employment and alcohol treatment following his retirement from the federal government. The record indicates that appellant was examined by Dr. Romanoski on August 8, 1985; however, no report on the examination was received by the Office despite requests from the Office.

On May 16, 1986 the Office referred appellant, together with the case record and statement of accepted facts, to Dr. Lawrence A. Brain, a Board-certified psychiatrist. In a report dated September 29, 1986 Dr. Brain reviewed appellant's employment history and medical treatment, reported his findings on examination of appellant and reviewing the diagnostic information provided, and stated:

> "In reviewing the documentation, there is sufficient historical information to support the conclusion that employment as an air traffic controller is a stressful occupation, a fact which is confirmed by the Statements of Accepted Facts, and that each person's ability in coping with the stress will vary according to their predispositions. Being an air traffic controller did not cause Mr. Davis to be an alcoholic as the antecedents for that condition were well-established prior to the major stressful events that occurred while he was an air traffic controller. However, it is my conclusion, similar to those of previous physicians, that the conditions of employment as an air traffic controller contributed to this man having substantial stress with which he attempted to cope through the use of alcohol. Therefore, it is my conclusion that the conditions of his employment aggravated a preexisting condition of chronic alcoholism. From the historical data it is evident that under other conditions of stress the claimant has turned to the use of alcohol as evidenced by his response to his wife's infidelity. Both following the reduction in stress by his stopping work in 1973, and the resolution of the marital conflict with his wife in 1983, the claimant has been able to enter into sobriety for extended periods of time.
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> "Therefore, in answer to the specific questions raised, it is my conclusion that the claimant suffers from a psychiatric con-

> dition which is defined as Alcohol Dependence, in remission (DSM III 303.93). It is my opinion that this is a chronic condition which was not precipitated by factors of employment as an air traffic controller, but was aggravated by it. It is my opinion, based on the historical information as well as medical reports, that the aggravation began some time in and around 1968 and continued until June of 1973. Dr. Salas, the treating psychiatrist, indicates in his report of June 1973, that the claimant had entered into a treatment program of detoxification and psychotherapy which was successful and led to a remission. Mr. Davis also indicates that he remained sober for a period of approximately nine months, thereby substantiating that he indeed made a recovery from the stress related to his employment as an air traffic controller. His subsequent return to drinking is in my view self-generated and not related to factors of employment. It is further apparent that in response to the stressors he has returned to the abuse of alcohol, which further are in no way related to conditions of employment. With regard to his reluctance to enter into treatment between the period of 1969 through 1973, I would comment that it is a well-known fact that denial is a part of the syndrome of chronic alcoholism and such avoidance of accepting responsibility for an extended period of time is almost universally found."

By memorandum dated November 14, 1986 the Office claims examiner noted that Dr. Brain was a member of the Metropolitan Psychiatric Group and associated with Dr. Fram, also a member of the medical group, who had previously examined appellant. The claims examiner noted: "Because it was incorrect to arrange another referee examination with [a] member of the same professional group, the Office is faced with a choice between arranging [another] referee examination in order to insure that all procedural considerations have been completely addressed, or making a substantive decision based on a report which is complete and well-rationalized notwithstanding the technical impropriety of using it." The claims examiner recommended that the Office use Dr. Brain's report.

By compensation order dated December 31, 1986 the Office accepted that appellant had sustained a temporary employment-related aggravation of his preexisting emotional condition which ceased in June of 1973, when he retired.

The Board finds that the case is not in posture for decision based on an unresolved conflict in medical opinion necessitating referral of appellant to a new impartial medical specialist.

At the time of the Board's March 13, 1981 order remanding case, the Board noted that the report of Dr. Allinson, the designated impartial medical specialist of record, was not adequate to resolve the conflict of medical opinion between Dr. Salas and Dr. Ayd. On remand, the Office was unable to secure a clarification or supplemental report from Dr. Allinson, which necessitated the selection of a new impartial medical specialist. Thereafter, the Office selected Dr. Fram to serve in the capacity as the impartial specialist; however, his medical reports were not well-rationalized on the issue of the aggravation of appellant's alcoholism by employment factors and failed to fully describe the nature of any permanent or temporary employment-related aggravation. For this reason, the Office properly sought examination and review by a new impartial specialist.

In the present case, the Office referred appellant to Dr. Brain, a Board-certified psychiatrist, to resolve the conflict in medical opinion. The Board notes that Dr. Brain was associated with Dr. Fram at the time of Dr. Fram's August 3, 1982 medical evaluation of appellant and continues to be associated with Dr. Fram. The Board finds, therefore, that Dr. Brain may not be considered as an impartial medical specialist because he was not appointed in accordance with the procedures established by the Office for the selection of such specialists.

A physician selected by the Office to serve as an impartial medical specialist should be one wholly free to make a completely independent evaluation and judgment.[4] In order to achieve this, the Office has developed specific procedures for the selection of impartial medical specialists designed to provide adequate safeguards against *any* possible appearance that the selected physician's opinion was biased or prejudiced.

On August 30, 1985 the Office issued Federal Employees' Compensation Act Bulletin No. 85-52 which addressed the exclusion of agency-connected physicians from the impartial rotation for certain cases.[5] As part of the action taken by the Office to insure the impartiality of the designated specialist under section 8123(a) was the following:

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[4] *Paul J. Rini*, 13 ECAB 557 (1962); *James P. Roberts*, 31 ECAB 1010 (1980); *George W. Coast*, 36 ECAB 600 (1985).

[5] Federal (FECA) Bulletin No. 85-52 (issued August 30, 1985).

> "The letter to the physician referring a claimant for impartial examination should include the following paragraph: 'Because this examination is being requested in accordance with a statutory provision for resolving a conflict in medical opinion, it is important that the physician have *no* previous connection with the claimant, and no regular association with the claimant's employing agency. *If you, or a member of your professional firm, have previously attended this patient,* or regularly perform fitness-for-duty examinations for the patient's employer . . . please call [the Office] so that other arrangements can be made for the impartial examination.'" (Emphasis Added)

The Board notes that at the time appellant was referred for examination to Dr. Brain, the Office failed to send any such letter to the physician advising him of his possible disqualification based on a prior evaluation or examination by members of his medical group or association. As such, the referral to Dr. Brain was not in keeping with the procedures established by the Office in securing a report from an impartial specialist.

On appeal the Director of the Office contends that the report of Dr. Brain should constitute the weight of medical opinion. In support of this contention, the Director cites to *Raymond E. Heathcock,*[6] a case in which the Board held that the physician selected by the Office as the impartial medical specialist may not be considered completely independent when the report of an associate gave rise to the conflict in medical opinion. In the present case, the Director contends that Dr. Brain should not be disqualified as the impartial specialist for the reason that Dr. Fram's reports did not *create* or "give rise" to the conflict in medical opinion but "were secured in an unsuccessful attempt to *resolve* the conflict" already existing in the medical evidence. The Board finds the Director's contention to be without merit. The argument presented by the Director fails to address the procedure established under FECA Bulletin No. 85-52, as set forth above, and ignores the central purpose of prior Board precedent which has been to ensure a process in selecting an impartial medical specialist in which the physician so designated is wholly free to make a completely independent evaluation and judgment.[7] The Board has disqualified physicians from serving

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[6] 32 ECAB 2004 (1981).

[7] In *George W. Coast, supra,* the Board found that a physician who was involved in performing fitness-for-duty examinations for the employing establishment could not serve as the impartial medical specialist; in *John E. Wallace,* Docket No. 84-1097 (issued June 25, 1984) the Board found that a physician who had acted as an Office medical consultant could not serve as the impartial medical specialist; and in *James W. Jean,* Docket No. 86-

Continued

in the capacity as an impartial specialist when the record demonstrates that such specialist is in association or otherwise affiliated with a physician whose medical opinion was used to create a conflict with appellant's attending physician as in *Heathcock*, or when the physician has otherwise reviewed the case record and provided an opinion on the claim. The Board does not wish to see the selection of an impartial medical specialist become a hypertechnical procedural process, but the Office must assure that the person designated as the impartial medical specialist has no prior association or affiliation with any other physician who has examined the claimant or provided an opinion on the claim. To hold otherwise would undermine the impartiality sought under section 8123(a). For this reason, the September 29, 1986 report of Dr. Brain will not be considered by the Board.

Accordingly, the case is remanded to the Office for referral of appellant, together with the case record and statement of accepted facts, to an impartial medical specialist not previously associated with this case. Upon receipt of the specialist's opinion, followed by any such further development as the Office deems necessary, a *de novo* decision should be issued.

The December 31, 1986 decision of the Office of Workers' Compensation Programs is set aside; the case is remanded for further proceedings consistent with this decision of the Board.

1565 (issued September 22, 1986) the Board found that an impartial medical specialist who resolved a conflict in medical opinion could not serve as the impartial specialist to resolve a subsequent conflict arising in the medical opinion.

In the Matter of ROBERT C. FAY *and* DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, Phoenix, Ariz.

Docket No. 87-542; Submitted on the Record;
Issued October 30, 1987

Before DAVID S. GERSON, MICHELE VON KELSH, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in justifying the rescission of appellant's disability compensation benefits in the amount of $3,115.14.

On April 22, 1979 appellant, then a 45-year-old principal/teacher filed a claim for compensation alleging that he was mentally exhausted and depressed as a result of his federal employment in Stebbins, Alaska. Appellant stopped work on November 1, 1978 and was placed on sick leave. He resigned from his position in Stebbins effective December 1, 1978.

Appellant described the events that led up to his depression as follows:

> "There were days and nights when we were unable to leave our home because of the crowds of drunks who roamed up and down the only street with knives and guns, using their weapons to harm each other or just fight anyone. We placed blankets over our windows so they would not know if we were home or not. Drunks or drug users would knock at our door at anytime day or night. If we let them in, they would refuse to leave. There usually was not any police force and when there was the police were busy in another part of town. Policemen quit regularly because their lives were threatened. For days and nights we hid in the school which was only a few yards away hoping none would know where we were . . .
>
> "I liked the people of Stebbins . . . But when the planeloads of hard liquor arrived the whole town drank and stayed drunk all day and night until the next plane came.
>
> "In one summer several men shot their toes off. A young man tried to enter our house with a large kitchen carving knife in his hand. He wasn't after us but he was tired of chasing some girls and needed a place to rest. I was walking in my back yard with my 10-year-old son when I saw the man with the knife enter the school and my home area and start up the steps towards our front door. We usually kept the door locked but I worried that [my wife] or our one-year-old would unexpectedly open the door so I rushed the armed man and got him to leave our yard. While I was doing that another drunk was chasing my 10-year-old, Matthew, who was visiting me for the month. Matthew hid under the bulldozer in the back yard next to the inside of the tracks. The man had a club and would have killed him had Matthew not had the presence to hide. All summer when these things were happening we were applying to our supervisor for a transfer. We were never sent any announcements although there were many educational positions in Alaska, BIA we qualified for . . .

> "Another incident must also be told because it seriously undermined our ability to continue there. My son was visiting me from Albuquerque, New Mexico. I had not seen him for several months. He was considering staying with me all year. The first evening or so on his way back from a nearby movie he attended with friends some boys of the village dragged him away from his companions and attempted to force him to take hard drugs. Matthew talked and forced his way out of the cabin without taking any drugs. About a week later Matt and several other boys were playing on a hill in sight of my home. They attempted to molest and rape him. He was very upset, enough so that I worried about permanent emotional damage to my son. I reported it to the police and afterwards kept him physically close to me . . ."

On November 1, 1978, when appellant was placed on sick leave, he travelled to Anchorage, Alaska where he stayed until November 10, 1978. During this time he sought treatment for his emotional condition.

In a report dated November 3, 1978, Dr. Charles F. St. John, a family practitioner stated:

> "[Appellant] has been a patient at this office on two occasions for increasingly severe psychosomatically induced symptoms culminating in an acute situational anxiety depression. The direct cause of his problems are the environmental and social strains placed upon him in his employment in the village of Stebbins, Alaska. The general usage of drugs and alcohol accompanied by lawlessness and lack of protection have led him to be in fear for the safety and well-being of his family and himself.
>
> "[Appellant] has had a continuous problem with gastrointestinal problems, cardiac irregularities and respiratory symptoms all stemming from the progressive anxiety tension syndrome. In the past three months, he has become progressively more depressed and is developing a feeling of hopelessness and feels that he is incapable of making decisions.
>
> "I can only feel that continuing residence in this community will lead to further deterioration of this man's mental health. I urgently suggest that he be reassigned to an area where the environmental and social stresses do not place him in such fear."

In a report dated November 8, 1978 Dr. J. Ray Langdon, a Board-certified psychiatrist, stated that appellant's agitation and depression "appeared to have been precipitated by his experience in Stebbins, for which he was apparently totally unprepared."

On November 10, 1978 appellant moved to Phoenix, Arizona. He remained unemployed until December 11, 1978 when he began part-time substitute teaching. He began full-time substitute teaching on February 17, 1979. Appellant began a regular full-time teaching position at the Arizona State Prison Department in September 1979.

The Office of Workers' Compensation Programs accepted appellant's claim for a temporary situational anxiety neurosis due to the factors of his employment. He was paid temporary total disability compensation for the period December 1, 1978 to February 17, 1979.[1]

On April 14, 1980 the Office received a mailgram from appellant claiming that his compensation benefits should have began effective November 1, 1978 when he went on sick leave, as opposed to December 1, 1978. Appellant also stated that he should be reimbursed for the difference in salary between his substitute teaching position in Phoenix, Arizona and his regular teaching position in Stebbins, Alaska. He alleged that his disability continued after February 17, 1979, but that he returned to work in February, 1979 in order to meet the financial responsibilities of his family.

In support of his claim appellant submitted a report dated June 20, 1979 by Dr. Gerald P. Shawn, a Board-certified psychiatrist, which noted that appellant had an anxiety neurosis and "developed psychophysiologic reactions including G.I. tract and cardiac function . . . while in an isolated educational station in Alaska." Dr. Shawn stated that he first began treating appellant on May 3, 1979 and that he was discharged from treatment on June 18, 1979. He concluded that appellant was totally disabled from May 3 through June 18, 1979.

In a report dated December 7, 1979 Claire A. Kurtz, a clinical psychologist, noted that appellant began treatment at the Tri-City Mental Health Center on May 12, 1979. She stated that appellant's emotional difficulties appeared to be an adjustment reaction to severe conditions experienced while teaching in Alaska. However, since she had no contact with appellant prior to May, 1979 it was impossible to directly evaluate his condition from November, 1978 to May 1979. In a subsequent report dated December 21, 1979 Dr. Kurtz stated that appellant originally made an appointment with the Center on January 16, 1979, but cancelled the appointment when he felt that the fee quoted him was more than he could afford.

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[1] During the period of time December 1, 1978 through February 17, 1979 appellant lived off savings, food stamps, unemployment checks and part time jobs as a substitute teacher. Because his income from substitute teaching during this time was only negligible, and unemployment compensation is not considered wages within the meaning of the Federal Employees' Compensation Act, appellant received temporary total disability compensation for the period December 1, 1978 through February 17, 1979.

On July 7, 1980 an Office medical adviser reviewed the case record and noted that Dr. Shaw indicated that appellant was disabled from May 3, 1979 until June 19, 1979, at which time he was found fit for full duty. The Office medical adviser concluded: "we really need a comprehensive narrative since [Dr. Shaw's report] is certainly too brief to evaluate."

By compensation order dated July 17, 1980 the Office rejected appellant's claim for compensation after February 19, 1979, stating that appellant's wage loss compensation benefits were terminated when appellant returned to fulltime substitute teaching on February 19, 1979. The Office also concluded, relying on the Office medical adviser's July 7, 1980 report, that the medical evidence failed to establish that appellant had any disability on or after February 17, 1979 causally related to his federal employment.

By compensation order dated September 17, 1982 the Office ordered that the compensation previously awarded be rescinded, and that the decision of the Office dated July 17, 1980 be vacated, finding that appellant's injury was not sustained in the performance of duty. The Office determined that the entire amount of the temporary total disability compensation which appellant received for the period December 1, 1978 to February 17, 1979, $3,115.14 was an overpayment. The Office determined that appellant was without fault in the creation of the overpayment because it was the responsibility of the Office to determine entitlement to compensation.

On October 12, 1982 appellant requested a hearing before an Office hearing representative on the issue of overpayment.

A hearing was held in the case before an Office hearing representative on August 6, 1986. At the hearing, appellant argued that no overpayment had occurred, because he sustained his illness while in the performance of his duty. Appellant alleged that when he was in Stebbins he lived in fully furnished government housing that was specifically assigned to the principal teacher. He stated that rent was deducted from his paycheck.

Appellant stated: "I was obliged to live in the house that I lived in because I was the principal teacher and I was supposed to be in charge of government property there. And I asked to move to a different village, which happened to be St. Michael's, and I was refused several times by Dick Francis, who was my Educational Program Specialist Supervisor." Appellant alleged that he had duties, other than principal teacher, which required him to live in Stebbins. Appellant distributed clean water to the village, radioed to the hospital in Nome in cases of medical emergencies, and tried to protect against pillaging and breaking into the school and clean water.

Appellant also testified that he would experience financial hardship in attempting to repay the $3,115.14, noting that his annual income was approximately $20,000.00 and his wife made approximately $1,500.00 a month. He indicated the following monthly expenses: $200.00 for rent; $520.00 for mortgage payments; $30.00 for water; $25.00-$40.00 for gas; $42.00 for electricity; $150.00 for telephone service; $900.00 for food. His debt included monthly payments of $150.00 to Trans America Finance; $117.00 to Arizona State Credit Union; $120.00 to Apple Credit; $120.00 for car repair; and $330.00 mortgage payments for second home they were trying to sell. The Office hearing representative requested that appellant submit documentation of his income and expenses as well as a completed "Overpayment Recovery Questionnaire."

Subsequent to the hearing appellant submitted a list of his creditors, a $144.00 telephone bill; and a weekly pay stub of $281.23. Appellant did not submit a completed "Overpayment Recovery Questionnaire."

By decision dated October 10, 1986 the Office hearing representative determined that appellant's injury was not sustained in the performance of duty.

The hearing representative's rationale for his decision was limited to a quote from the September 17, 1982 Office's decision which stated:

> "Throughout this case no factors of the actual employment activity are mentioned as causing the injury. It is the employee's interpersonal relationships with members of the community which are given as causes of injury. Because the claimed condition and disability developed as a result of the inability of the employee to adjust to the particular lifestyle of a substantial part of the community, the fact that no specific work activities have been mentioned as precipitating adverse community action directed toward the employee, the housing provided by the employer had no influence on the development of the injury, the employee applied for and accepted employment spe-

> cifically at Stebbins, Alaska, and it was the lifestyle of the community rather than its isolation which created the environment in which the employee sustained injury, the employee cannot be considered as having sustained an injury in the performance of duty."

The hearing representative found that appellant received an overpayment in the amount of $3,115.14, and that he was "without fault" with respect to amount of the overpayment. However, the hearing representative found that the circumstances of the case did not warrant waiver of the overpayment, in that appellant had not submitted sufficient evidence in support of his testimony to establish either his argument based upon detrimental reliance or his argument based upon financial hardship.

The Board finds that the Office has failed to meet its burden of proof in establishing that appellant's disability was not sustained in the performance of duty; and therefore was not justified in rescinding appellant's compensation benefits.

Once the Office accepts a claim and pays compensation, it has the burden of justifying the termination or modification of compensation. This holds true where, as here, the Office later decides that it has erroneously accepted a claim.[2]

In the present case the Office accepted appellant's claim for an emotional condition on the grounds that he sustained his disability in the performance of duty. The Office later rescinded appellant's compensation benefits on the grounds that appellant's emotional condition was caused not by "factors of the actual employment activity" but rather by appellant's "interpersonal relationships with members of the community." The Office stated that it was appellant's inability to adjust to the particular lifestyle of the community, rather than any specific work activities which attributed to appellant's disability. However the Office failed to address such factors as appellant's allegations that many of his responsibilities in Stebbins required an interraction with members of the community. Appellant stated that many of his responsibilities included distributing clean water to the village, radioing the hospital in cases of medical emergencies, and trying to protect against pillaging and breaking into the school and clean water. The Office has not shown how appellant could perform these duties without having personal contact with the community. In addition, the Office has not shown how appellant's job as a principal/teacher was limited to the classroom, where he presumably taught children. The record does not contain a copy of appellant's job description.

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[2] *Walter Asberry, Jr.*, 36 ECAB 686 (1985).

The Office also failed to obtain records from the employing establishment showing whether appellant lived in government housing during his federal employment in Stebbins, and if so, whether the duties of his federal employment required him to live in this housing. In addition, the Office failed to consider whether appellant's rent was at a noncompetitive rate, as well as the availability of other housing in the area. The Board has stated that the Office has a responsibility in the development of factual evidence, particularly when such evidence is of the character normally obtained from employing establishment or other government sources.[3] When, as, in this instance, the Office has the burden of proof in showing that appellant's disability was not sustained in the performance of duty, it is the Office's burden to furnish a complete description of appellant's duties, and show how his disability was not a result of these responsibilities. Since the Office has failed to meet its burden of proof, the recission of appellant's disability compensation benefits in the amount of $3,115.14 was not justified.

The decision of the Office of Workers' Compensation Programs dated October 10, 1986 is reversed and the case is remanded for further development with respect to any loss of wage-earning capacity appellant may have sustained during the period February to September 1979; as well as any possible disability appellant had after February 17, 1979 causally related to his federal employment.

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[3] *Russell Martin Dawson*, 32 ECAB 1998 (1981).

In the Matter of LENARD E. FRITZ *and* VETERANS ADMINISTRATION, VETERANS ADMINISTRATION HOSPITAL, Tacoma, Wash.

Docket No. 87-1483; Submitted on the Record;
Issued October 30, 1987

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request for reimbursement for the cost of installation of a hot tub and whirlpool in his home.

On September 22, 1977 appellant, then a 48-year-old general mechanic, filed a claim for an injury sustained the previous day when he fell and struck his right shoulder and neck on a pipe or beam. Appellant stopped work on September 23, 1977 and received continuation of pay beginning that date.

On October 10, 1977 appellant was examined by Dr. Dumont Staatz, a Board-certified orthopedic surgeon, who diagnosed a neck strain. In a November 8, 1977 report Dr. Staatz stated that appellant now had mid-thoracic and low back pain in addition to his arm, neck and right shoulder pain.

The Office determined that appellant was entitled to compensation, and began payment of compensation for temporary total disability after his continuation of pay ended.

After obtaining a report from a panel of medical specialists, the Office determined that appellant's low back condition was causally related to his employment injury. The Office authorized a CT (computed tomography) scan and myelogram, the results of which were consistent with a herniated or protruded disc at L4-5 on the right side.

The Office authorized surgery to remove appellant's L4 disc, which Dr. Staatz did on February 8, 1982.

In an April 15, 1983 report Dr. Staatz stated that appellant was maximally improved from this surgery but had residual back pain and probably lumbar radiculitis with superimposed buttock neuropathy. In a May 18, 1984 report Dr. Staatz stated that appellant still had low back pain and that he was totally disabled by "a combination of his diabetes, his diabetic neuritis, his previous low back problem, his cervical spondylitis, multiple nerve entrapment, and reportedly he now has angina by history." In an April 12, 1985 report Dr. Staatz stated that it was "very hard to separate the diabetic neuritis from the residuals of his back and neck problems."

In a March 25, 1986 letter appellant requested reimbursement for the cost of installing a hot tub and whirlpool in his home, stating that this treatment was recommended by Dr. Staatz, that he needed this type of treatment frequently for his severe pain in the morning, and that he had had the facility installed and his home remodeled to make treatment available at a cost of $11,810.00.

In an April 1, 1986 letter Dr. Staatz stated:

> "It was felt that he could be symptomatically improved with a hot tub as long as this hot tub was kept below the burning

> level. This would make him much more comfortable and hopefully, decrease the need for pain medication."

In response to an Office claims examiner's inquiry whether an Office medical adviser's opinion on the purchase of a hot tub in another claimant's case, which was attached, applied to appellant's case, an Office medical adviser asked how the Office could separate its responsibility for residuals of low back surgery from appellant's other serious medical problems in determining the cause of appellant feeling bad in the morning.

By decision dated June 19, 1986 the Office denied reimbursement for the cost of having a hot tub and whirlpool installed, stating that its medical adviser had reviewed the request and in his opinion the hot tub and whirlpool would not be likely to cure his condition, give relief (stating that the same short-term relief could be attained with a hot water bottle or electric heating pad), or reduce the degree or period of disability.

Appellant requested a hearing and submitted a September 8, 1986 report from Dr. Bernard A. Roos, a Board-certified internist, stating:

> "The on-the-job injury resulted in lower back surgery at the L-4 area and a problem in the cervical area that is still unresolved, both of which cause severe pain. Mr. Fritz has a history of extreme depression and anxiety that result in physical and mental stress. I feel that hot tub/whirlpool therapy is an important factor in Mr. Fritz's ability to function on a daily basis and would aid Mr. Fritz in his diabetic control by reducing the stress level caused in part by his physical and mental frustration and pain as a result of his injury."

By a decision dated October 31, 1986 the Office vacated its June 19, 1986 decision, on the basis that its Office medical adviser's opinion was not in the record and that it was inappropriate to attach the medical adviser's opinion on another case to a request for an opinion on appellant's case.

On November 19, 1986 the same Office medical adviser reviewed the evidence and stated that his opinion was unchanged, and that it appeared that appellant was suffering more from diabetes than from his accepted conditions. The Office medical adviser recommended an opinion from an impartial medical specialist whether a hot tub would appreciably change the course of the accepted condition or only afford momentary comfort.

On February 9, 1987 the Office referred appellant, the case record and a statement of accepted facts to Dr. W. Brandt Bede, a Board-certified orthopedic surgeon, for an opinion whether a hot tub and whirlpool would be likely to cure appellant's employment-related conditions, give appellant relief from the effects of these conditions, explain why a hot tub and whirlpool would be different than using a hot water bottle or electric heating pad, and whether they would reduce the degree of or the period of disability or lessen the amount of compensation.

In a March 17, 1987 report Dr. Bede set forth his findings on examination and x-rays, as well as appellant's history. Dr. Bede concluded:

> "Specifically, to answer the questions you have presented to me it is my medical impression that a hot tub or whirlpool would give temporary relief to his discomfort because of the cervical strain, degenerative disc disease of the cervical, thoracic and lumbar spine. It is also my impression that a whirlpool will not decrease the degree of, or period of, disability of the above conditions, but will make his daily life more comfortable. Final compensation for the above conditions may be decreased by use of a whirlpool, specifically by decreasing the number of medications required because of pain."

In response to a request for the cost of his medications for his low back and cervical conditions, and for the cost of the whirlpool alone, appellant replied that his medications were covered by medical care provided by his retirement from the military service, but that he could not extensively use pain medication because he was easily addicted and because it caused severe stomach problems. He submitted a partially illegible bill for the installation of the hot tub in his home.

By a compensation order dated April 29, 1987 the Office found that the medical evidence did not establish that a hot tub and whirlpool would be likely to cure, give relief, reduce the degree of or the period of disability, or aid in lessening the amount of compensation paid.

The Board finds that the Office did not abuse its discretion by refusing to reimburse appellant for the cost of installation of a hot tub and whirlpool.

Section 8103 of the Federal Employees' Compensation Act provides for the furnishing of "services, appliances, and supplies prescribed or recommended by a qualified physician" which the Office, under authority delegated by the Secretary, "considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of monthly compensation." [1]

In the present case there is no indication that the hot tub and whirlpool for which appellant seeks reimbursement were recommended or prescribed by any physician before they were installed in appellant's home. Appellant requested reimbursement for the installation in a March 25, 1986 letter, and the first report addressing whether the hot tub and whirlpool would give appellant relief was an April 1, 1986 report from Dr. Staatz. While this report and the reports from Drs. Roos and Bede indicate that a hot tub and whirlpool would satisfy one of the alternatives under section 8103 of the Act, namely "give relief," none of the medical evidence contains a recommendation or prescription for the installation of a hot tub and whirlpool in appellant's home. Without such recommendation or prescription it is premature to consider the question of whether the appliance would "cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of monthly compensation."

The decision of the Office of Workers' Compensation Programs dated April 29, 1987 is affirmed.

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[1] 5 U.S.C. section 8103.

In the Matter of JESSE L. GREEN *and* U.S. POSTAL SERVICE, POST OFFICE, Pittsburgh, Pa.

Docket No. 87-1026; Submitted on the Record;
Issued October 30, 1987

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment in the amount of $56,564.26 occurred as a result of appellant's forfeiture of his right to compensation; and (2) whether the Office properly required recovery of the overpayment by a salary offset of $86.00 per pay period.

This is appellant's second appeal to the Board. In its decision and order dated December 24, 1985 the Board found that the evidence of record established that appellant knowingly failed to report earnings from self-employment during the periods September 7, 1976 through September 7, 1977, December 4, 1978 through December 4, 1979, and February 1, 1981 through February 1, 1982; that pursuant to section 8106(b) appellant was subject to the forfeiture provisions of the Federal Employees' Compensation Act; that appellant's failure to report earnings resulted in an overpayment of compensation; that appellant was not without fault with respect to the creation of the overpayment; and that there was no basis for waiver of the overpayment. The Board set aside the August 1, 1985 ruling of an Office of Workers' Compensation Programs hearing representative, finding that the Office was not limited to finding that appellant had forfeited his right to compensation solely for the periods mentioned above, and remanded the case to the Office to consider all such periods for which appellant was required to make a report on earnings from self-employment and failed to do so and apply the forfeiture provision to the entire period if he had any outside earnings from employment or self-employment during such periods. The Board's prior decision sets forth the facts and history of the case and is hereby incorporated by reference.[1]

On remand, the Office claims examiner reviewed the case record and noted that appellant failed to report earnings while in receipt of compensation for the period September 7, 1976 to November 3, 1982 which resulted in an overpayment in the amount of $58,997.26.

By letter dated September 10, 1986 the Office made a preliminary determination that there had been an overpayment in the amount of $58,997.26 which occurred because appellant failed to report earnings from self-employment as required under the Act. The Office further advised appellant that he was found at fault in the creation of the overpayment and advised that he could submit further evidence or arguments relating to the amount of overpayment; the fact the overpayment had occurred; or that the overpayment occurred through no fault of appellant. The Office also advised appellant of his right to a prerecoupment hearing.

Appellant requested a hearing before an Office hearing representative and submitted an Overpayment Recovery Questionnaire (OWCP-20). Appellant listed a total net monthly income of $2,150.00 based on his income ($1,150.00 net) with the postal service and his wife's income ($1,000.00 net); listed a total $2,217.00 in monthly expenses consisting of $450.00 in mortgage or rent, $350.00 for food, $100.00 for clothing, $250.00 for utilities, $837.00 in other miscellaneous expenses, $180.00 to the federal credit union, and $50.00 to the Postal Service Employees' credit union; listed $50.00 in cash on hand, $100.00 in check account balance, and no money in a savings account or stocks and bonds.

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[1] Docket No. 85-1815 (issued December 24, 1985).

Following the hearing held on December 11, 1986 appellant submitted documents relating to his utility expenses, mortgage payments of $235.00 per month; car payment of $262.44 per month, insurance payments, $54.00 in car pool expense for appellant's wife; medical and dental bills; tuition expenses for appellant's son; charge card bills; and charitable contributions to appellant's church.

In a decision dated and finalized March 9, 1987 the Office hearing representative found that appellant was at fault in the creation of an overpayment of compensation for the period September 7, 1976 through July 14, 1982; that appellant reported earnings from his employment activities beginning July 15, 1982 and, therefore, that the period of overpayment did not run through November 3, 1982 as previously determined by the Office. The amount of overpayment was found to be $56,564.26, an amount provided appellant and his representative at the hearing and not disputed. The hearing representative noted that appellant had testified that he was not gainfully employed during the period he was in receipt of compensation benefits; rather, he had taken up photography as a hobby recommended by his physician and that he did not make any money from taking photographs of people but was reimbursed by them for the costs of buying film and development. The hearing representative found that due to the freelance nature of appellant's work, individual dates and payments were not well-established; however, the record showed that appellant was engaged in photography on a regular basis from late 1976/early 1977 through 1982 and that appellant had established a business arrangement with the Holiday House to solicit photographs of customers. Appellant was found not without fault for failure to report earnings from his self-employment. The hearing representative reviewed appellant's OWCP-20 and noted that appellant's monthly net disposable income reflected deductions for the credit union installment payments so that these payments could not be listed a second time by appellant as monthly expenses. This reduced appellant's monthly expenses by $230.00 to $1,987.00 per month; however, appellant provided documentation of an additional monthly payment of $181.00 for a consumer loan which increased his net monthly expense to a total of $2,168.00. The hearing representative found that Office regulations allowed for collection of the overpayment by a salary offset of installment payments of up to 15 percent of the debtor's disposable pay per pay period and that such an offset at a rate of fifteen percent of appellant's take-home federal salary of $575 each pay period would be $86.00 per pay period.

On August 9, 1985 appellant filed an application for review contending that he had earned no monies from "self-employment" and that his activities consisted of a hobby from which he made no earnings.

In the prior appeal, the Board found that appellant had forfeited his right to compensation benefits because he knowingly failed to report, when requested by the Office, earnings from self-employment during the periods September 7. 1976 through September 7, 1977, December 4, 1978 through December 4, 1979, and February 1, 1981 through February 1, 1982 and that appellant was subject to the forfeiture provisions of section 8106(b). The Board also determined that appellant's failure to report earnings from self-employment resulted in an overpayment, that he was not without fault with respect to the creation of the overpayment, and therefore, that there was no basis for waiving the overpayment. The case was remanded to the Office to determine the amount of overpayment based on the Board's findings that the Office could apply the forfeiture provision of the Act to any period for which appellant had outside earnings from self-employment, was required to make a report, and failed to do so.[2]

The Board finds that the Office properly determined that an overpayment was created in the amount of $56,564.26 which occurred as a result of appellant's forfeiture of his right to compensation for the period September 7, 1976 to July 14, 1982.

The evidence of record establishes that appellant was in fact engaged in work activity for the period September 7, 1976 to July 14, 1982 and was not totally disabled. The record indicates that appellant received earnings which he was required to report under section 8106(b) and documents that appellant engaged in self-employment during the periods covered by the various CA-1032's, when appellant was required to make a report to the Office, and during periods not covered by the CA-1032's when appellant had outside earnings from self-employment which he failed to report to the Office. Under these circumstances, the Office properly determined that appellant knowingly failed to report earnings from employment commencing September 7, 1976 to July 14, 1982 and that pursuant to the provision of section 8106(b), his failure to report such earnings or employment activity resulted in the forfeiture of his right to compensation.

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[2] On appeal, appellant's representative contends that an overpayment was not created as appellant did not receive any earnings from his self-employment. The Board notes that the issue of whether or not an overpayment was created in this case was addressed in the prior decision. However, the Board would note further that appellant's contention that he was not required to report his earnings because his expenses exceeded the amount of his income has not been accepted by the Board as a reasonable justification for failure to report earnings or employment to the Office as required. *See Howard Sprayberry*, 36 ECAB 115 (1984).

The Board previously found that appellant was not without fault in the creation of the overpayment, therefore, the forfeited compensation totalling $56,564.26 is subject to recovery.

The Board notes that the Debt Collection Act of 1982 [3] provides that debts owed to a federal agency may be collected by periodic offsets against the salary of a debtor who is employed by another federal agency. The Department of Labor's regulations covering salary offset were published in the Federal Register on February 5, 1987 and became effective March 9, 1987.[4] Under the procedures established by the Debt Collection Act, collection techniques were developed for deducting from the current pay account of a federal employee a "salary offset" when the employee owes money to the United States. In FECA Bulletin No. 87-35, the Office of Workers' Compensation Programs implemented the Department's regulations to require other federal agencies to make regular deductions from the employee's salary to satisfy an outstanding debt.[5]

The Board notes that decisions made by the Office under the Debt Collection Act are reviewable by the Office of the Administrative Law Judge under 29 C.F.R. Part 18. For this reason the Board does not have jurisdiction to review the discretionary authority of the Office with regard to the method of recovery provided under the Debt Collection Act as this involves an offset against the salary of a federal employee as opposed to recovery made against continuing compensation benefits of an employee.

The Board therefore finds that appellant forfeited his right to compensation for the period September 7, 1976 to July 14, 1982 for failure to report earnings from self-employment; the Office properly determined that an overpayment was created in the amount of $56,564.26 and that the overpayment should be recovered. With regard to the method of recovery under 29 C.F.R. Part 29, the Board finds that it does not have jurisdiction to consider the matter as the Board's jurisdiction is limited to appeals from final decisions of the Office arising under the Federal Employees' Compensation Act.[6]

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[3] Debt Collection Act, 5 U.S.C. section 5511 *et seq.*, Pub. L. 97-365.

[4] 52 Fed. Reg. 3,772 (February 5, 1987) (to be modified at 29 C.F.R. part 20).

[5] FECA Bulletin No. 87-35 (issued April 24, 1987).

[6] *See* 20 C.F.R. section 501.2(c).

The decision of the Office of Workers' Compensation Programs, dated and finalized March 9, 1987, is affirmed.

In the Matter of WILLIAM T. MCPHEE *and* U.S. POSTAL SERVICE, POST OFFICE, Boston, Mass.

Docket No. 87-903; Submitted on the Record;
Issued October 30, 1987

Before GEORGE E. RIVERS, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to issue a subpoena for an official of the Office to appear at a hearing before an Office hearing representative.

On September 8, 1981 appellant then a 52-year-old letter carrier, was going up a set of steps when one step tilted and appellant "jammed" his right knee. Appellant did not work on September 9 and September 10, 1981, returned to work, and stopped again on September 21, 1981. He received continuation of pay form September 22, 1981 to November 3, 1981.

Dr. Joseph Abate, a Board-certified orthopedic surgeon, diagnosed a torn medial meniscus and chondromalacia. On November 9, 1981 Dr. Abate performed an arthroscopic excision of the medial meniscus and chondroplasty. On January 27, 1982, Dr. Abate performed an arthrotomy and medial meniscectomy.

The Office of Workers' Compensation Programs accepted appellant's claim for internal derangement of the right knee and began payment of temporary total disability compensation effective November 4, 1981.

In a third party action, appellant recovered $82,500. After deductions for attorney's fees, court costs, 20 percent of the adjusted gross recovery, continuation of pay and Office disbursements for medical expenses and compensation,[1] the Office calculated that appellant had a credit of $14,820.46 on future payments of compensation.

On December 6, 1984 the Office issued to appellant a schedule award for 21 percent permanent impairment of the right leg. The schedule award was for the period September 9, 1983 to October 5, 1984. The Office paid appellant $20,218.14 in a lump sum.

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[1] *See* 5 U.S.C. section 8132.

In a December 9, 1985 preliminary decision, signed by David T. Woods, Chief, Branch of Claims, the Office found that there had been an overpayment of $14,820.46 in appellant's case because the third party credit of $14,820.46 was not applied against the compensation due for the December 6, 1984 schedule award. The Office further found that appellant was without fault in the matter of the overpayment. Appellant was advised that recovery of the overpayment may be waived if it could be shown that such recovery would defeat the purpose of the Federal Employees' Compensation Act or would be against equity and good conscience. Appellant was also advised that he could request a hearing before an Office hearing representative.

In a July 22, 1986 decision, signed by David T. Woods, the Office found that an overpayment of $14,820.46 had occurred because the third party credit had not been applied against compensation due for the schedule award. The Office indicated that no evidence or arguments had been submitted to support waiver of recovery of the overpayment. The Office found that the circumstances of appellant's case did not warrant waiver of recovery of the overpayment.

In an August 18, 1986 letter, appellant's attorney requested a hearing before an Office hearing representative. A hearing was scheduled for January 26, 1987.

In a January 8, 1987 letter, appellant's attorney requested that the Office issue a subpoena for David T. Woods stating that he was the author of the overpayment decisions and therefore was an essential witness. The hearing was postponed due to inclement weather.

In a January 27, 1987 letter decision, the Office denied the request for the subpoena of David T. Woods on the ground that he was performing in his adjudicating capacity in appellant's case and would have nothing further to add.

The Board finds that the Office did not abuse its discretion in refusing to issue a subpoena for the Chief Branch of Claims in a district office of the Office.

Section 8126 of the Act [2] states, "The Sectary of Labor, on any matter within his jurisdiction under this subchapter may (1) issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles . . ." This section of the Act gives the Office discretion to grant or reject requests for subpoenas.

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[2] 5 U.S.C. section 8126; *See* also 20 C.F.R. section 10.133(b).

The function of the Board on this appeal is to determine whether there has been an abuse of discretion. Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgement, actions taken which are clearly contrary to logic and probable deductions from established facts.[3] The Board finds the Office's refusal to issue the subpoena was reasonable under the circumstances of the case and does not constitute an abuse of discretion.

The review of the mental processes of administrative decision makers are to be largely avoided.[4] Where there are administrative findings made at the same time as a decision, there must be a strong showing of bad faith or improper conduct before such an inquiry may be made.[5] In this case, the overpayment decision was accompanied by administrative findings. No showing of bad faith or improper conduct has been made. Therefore the Chief of Claims when acting in an adjudicating capacity as he did in this case, cannot be subpoenaed to explain his decision in a hearing before an Office hearing representative unless bad faith or improper conduct in making his decision has been shown.

The decision of the Office of Workers' Compensation Programs, dated January 27, 1987, is hereby affirmed.

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[3] *Bruce E. Hickey*, 20 ECAB 253 (1969); *see also George Lanzy*, 35 ECAB 746 (1984); *Dorothy Bernard*, 37 ECAB 124 (1985); *Jerry Gines*, Docket No. 85-2032 (issued November 29, 1985).

[4] *U. S. vs. Morgan*, 313 U. S. 409 (1941).

[5] *Citizen to Preserve Manufacturing Corp. vs. NLRB*, 497 F.2d 298 (2nd Cir., 1984); U.S. vs. Bowdy, 440 F. Supp. 894 (W.D. Va., 1977).

In the Matter of JIMMY B. NEWELL *and* DEPARTMENT OF THE NAVY, NAVAL SYSTEMS COMMAND, PUGET SOUND NAVAL SHIPYARD, Bremerton, Wash.

Docket No. 87-1089; Submitted on the Record;
Issued October 30, 1987

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether appellant has more than a nine percent monaural hearing loss for which he received a schedule award.

On December 26, 1984 appellant, then a 57-year-old pipefitter filed a claim alleging that he sustained a hearing loss causally related to his exposure to noise in his federal employment. The employing establishment submitted appellant's personnel and medical records which indicated that appellant was exposed to hazardous noise levels (84–105 dBA) during his federal career. Appellant has not stopped work.

The Office of Workers' Compensation Programs referred appellant to Dr. Kent Cox, a Board-certified otolaryngologist, for otologic examination and audiologic evaluation. In a report dated January 24, 1986 Dr. Cox reviewed appellant's history of noise exposure, noted that physical examination of appellant was normal, and stated that audiological evaluation of appellant revealed a sloping, mild-to-moderate, sensorineural hearing loss.[1] Dr. Cox indicated that appellant's tests were compatible with a noise-induced hearing loss caused by appellant's repeated exposure to noise at the shipyard.

On March 5, 1986 an Office medical adviser reviewed the case record and noted that, after applying the Office's new standardized procedures for determining the extent of hearing loss, appellant had a 9.37 percent monaural loss in his left ear, a 0 percent monaural loss in his right ear and a 2 percent binaural loss.

By compensation order dated May 19, 1986 the Office awarded appellant a schedule award for a 9 percent monaural hearing loss to his left ear. The period of the award was for 4.68 weeks of compensation and ran from January 9, 1986 through February 10, 1986. On June 4, 1986 appellant notified the Office that he protested the amount of the schedule award. Thereafter, an appeal was docketed with the Board and the case record forwarded to the Board for its review. By letter dated June 30, 1986 counsel for appellant advised the Board of appellant's wish to request reconsideration by the Office. By order dated July 22, 1986 the Board dismissed appellant's appeal and returned the record to the Office.[2]

In support of appellant's request for reconsideration, appellant submitted a July 2, 1986 medical report by Dr. Stephen A. Habener, a Board-certified otolaryngologist, who opined that appellant had a sensorineural hearing loss of 15 percent in the right ear and 22.5 percent in the left ear compatible with the noise history appellant described. Dr. Habener's report was accompanied by July 2, 1986 audiogram testing which reported good reliability.

Dr. Habener's report was referred to the Office medical adviser for an opinion on the percentage of hearing loss indicated. The

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[1] Dr. Cox reported the following audiometric test results from a January 9, 1986 evaluation at 1,000, 2,000 and 3,000 cycles per second: 20, 25 and 45 decibels in the right ear and 20, 35 and 55 decibels in the left ear (at 500 Hz appellant's results were 10 decibels in the right ear and 15 decibels in the left ear).

[2] Docket No. 86-1552 (issued July 20, 1986).

Office medical adviser reviewed the July 2, 1986 audiogram results obtained for Dr. Habener and opined, on March 3, 1987, that appellant had a 9 percent binaural hearing loss. The medical adviser noted that the date of maximum medical improvement was July 2, 1986.

By letter compensation order dated March 11, 1987 the Office denied appellant's request for an additional schedule award, finding less than one year had elapsed since the issuance of the May 19, 1986 schedule award and, as appellant was still being exposed to employment-related noise, no additional schedule award could be paid as less than one year had elapsed since the beginning date of the May 19, 1986 schedule award.

The Board finds that appellant does not have more than a nine percent monaural hearing loss for which he received a schedule award.

The schedule award provisions of the Federal Employees' Compensation Act set forth the number of weeks of compensation to be paid for permanent loss of use of the members of the body listed in the schedule. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of the Office.[3] However, as a matter of administrative practice the Board has stated: "For consistent results and to insure equal justice under law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants."[4]

In *Richard Beggs,*[5] the Board reviewed two standards used by the Office in determining the extent of permanent impairment in cases involving the evaluation of hearing loss. The first standard, utilized prior to February 28, 1973, was based on the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (First Edition) which provided that the percentage loss of hearing was to be measured at three levels: 500, 1,000 and 2,000 cycles per second.[6] After February 28, 1973 the Office evaluated hearing loss claims in accordance with the standards of the National Institute for Occupational Safety and Health (NIOSH) as set forth in its publication *Occupational Exposure to Noise.*[7] This standard differed from those of the A.M.A. *Guides* in that the percentage loss of hearing is measured at 1,000, 2,000 and 3,000 cycles per second.[8] In *Beggs,* the Board noted that A.M.A. *Guides* and NIOSH standards both provided the same averaging method for determining whether there is a ratable loss of hearing.[9] Where the average hearing loss at the respective frequency levels is 25 decibels or less there is not ratable loss for, as the *Guides* point out, in such situations no impairment exists in the ability to hear everyday speech under everyday conditions.[10]

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[3] *Richard Beggs,* 28 ECAB 387 (1977); *Danniel C. Goings,* 37 ECAB 781 (1986).

[4] *August M. Buffa,* 12 ECAB 324 at 325 (1961); *Henry L. King,* 25 ECAB 39 at 44 (1973).

[5] 28 ECAB 387.

[6] American Medical Association's *Guides to the Evaluation of Permanent Impairment,* pp. 103–107 (1st ed. 1971). *See Melvin E. Singleton,* 17 ECAB 410 (1966), 19 ECAB 108 (1967); *Wilbert W. Brown,* 20 ECAB 205 (1969).

[7] *Occupational Exposure to Noise,* published in 1972 by the U.S. Department of Health, Education and Welfare, Health Services and Mental Administration, National Institute for Occupational Safety and Health Act, 84 Stat. 1597.

With regard to the instant case, the Board notes that on February 24, 1986 the Office adopted a new standard for determining the extent of permanent impairment in hearing loss cases.[11] This standard is based on the formula contained in the second edition to the A.M.A. *Guides* published in 1984.[12] As noted by the Office Program Memorandum:

> "The A.M.A.'s formula calculates the hearing loss for one ear (monaural) by testing for hearing loss at the 500, 1,000, 2,000 and 3,000 frequency levels. The losses at each frequency are added up and averaged and, using ANSI-ISO standards, the 'fence' of 25 decibels is deducted from the average loss. The result is multiplied by 1.5 to arrive at monaural hearing loss. To determine the loss for both ears (binaural), the loss in each is calculated using the formula for monaural loss. The lesser loss in multiplied by 5, then added to the greater loss. The total is divided by 6 to arrive at the binaural loss."

The Office has adopted this new standard in order that programs administered by the agency are consistent in their hearing loss evaluation procedures. Further, this standard was made applicable to all hearing loss evaluations made on or after February 24, 1986.[13] Federal Employees' Compensation Act Program Memorandum 272 states:

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[8] *See Terry A. Wethington,* 25 ECAB 247 (1974), in which the Board approved the use of the NIOSH standards as an appropriate procedure for measuring hearing loss.

[9] 28 ECAB 387 at 391-392.

[10] *See Carl E. McGinnis,* 16 ECAB 360 (1965); *Dewey H. Burchett,* 28 ECAB 393 (1977); *Jack R. Lingren,* 35 ECAB 676 (1984). The Board notes that this is assuming the audiogram is based on ISO-ANSI calibration.

[11] FECA Program Memorandum No. 272 (issued February 24, 1986). The Program memorandum notes that in amendments made to the Longshoremen's and Harbor Workers' Compensation Act Congress mandated the use of the formula of the A.M.A. *Guides* (2nd ed. 1984). *See also Danniel C. Goings, supra* note 3.

[12] American Medical Association's *Guides to the Evaluation of Permanent Impairment,* pp. 153-158 (2nd ed. 1984).

[13] *Danniel C. Goings, supra* note 3.

> "This revised procedure will apply to all decisions made on or after the date of this memorandum [February 24, 1986]. In cases where the claimant has applied for review, either by reconsideration or by the Branch of Hearings and Review, the case will be reviewed using the formula in use at the time of the original decision if there has been no further noise exposure. In cases of additional exposure and therefore additional injury, the new formula will be applied."

In *Richard Beggs,*[14] the appellant filed a claim prior to a previous change in hearing loss computation standards but had his case record evaluated by an Office medical adviser subsequent to the change in standards. In that case, the Board noted the following:

> "Through the years, ever since the schedule award provisions of the Act became effective, many changes have been made by the adjudicating agency in the procedures and standards used in determining the percentage loss of use of a scheduled member of the body. These changes were generally made as additional experience was acquired or as new studies became available in this complex field. The Board has approved of such changes where they appeared to be reasonable and to be fair to claimants. It has not imposed a requirement that a change in standards is to be applied only to claims filed after the adoption of the change. There would appear to be no sound basis for such delay in putting the new standard into effect." [15]

In the present case appellant was issued a schedule award for a 9 percent monaural hearing loss on May 19, 1986 based on a January 9, 1986 audiogram. The Office properly applied the new formula to this determination because the compensation order granting the schedule award was issued after February 24, 1986.[16]

On June 30, 1986 appellant requested reconsideration of the Office's May 19, 1986 compensation order granting appellant a schedule award for a nine percent monaural hearing loss to his left ear. In support of his request for an additional schedule award appellant submitted a July 2, 1986 report of Dr. Habener. However, since appellant continued to work at the shipyard and continued to be exposed to noise Chapter 2-806, 16, (6) of the Federal Procedure Manual applies which states:

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[14] 28 ECAB 387 (1977).

[15] *Id.* at 393.

[16] *See* FECA Program Memorandum 272.

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> "In cases of hearing loss where a schedule award is paid before noise exposure terminates, no additional award will be paid for periods of less than one year from the beginning date of the last award or the date of last exposure, whichever comes first."

In addition, the claimant must file a NEW claim, with supporting exposure history for the period subsequent to the time frame involved.

In the present case appellant's schedule award began on January 9, 1986. Since appellant continued to be exposed to employment noise he is not entitled to an additional schedule award based on Dr. Habener's July 2, 1986 report until one year has elapsed since the beginning date of the last schedule award. Accordingly, appellant's claim for an additional schedule award for hearing loss was properly rejected.[17]

The May 19, 1986 and March 11, 1987 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

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[17] The Board notes that one year has now elapsed since the beginning date of appellant's schedule award. Appellant may now file a new claim for additional schedule award.

In the Matter of SALLIE B. WYNECOFF *and* U.S. DEPARTMENT OF EDUCATION, CREDIT AND DEBT MANAGEMENT RESEARCH, San Francisco, Calif.

Docket No. 86-2103; Submitted on the Record;
Issued October 30, 1987

Before GEORGE E. RIVERS, DAVID S. GERSON, MICHELE VON KELSCH

The issue is whether appellant's injury was sustained in the performance of duty.

On May 28, 1985 appellant, then a 49-year-old accounts examiner, sustained a fracture of the right fifth metatarsal and strains of the lumbosacral spine and left knee when she slipped and fell on a plaza approximately 20 feet outside the exit from the federal office building housing the employing establishment. The case record shows that appellant slipped and fell on wax which had accumulated during a May 27, 1985 demonstration on the plaza located immediately adjacent to the exit from the federal building. The case record indicates that on May 27, 1985, a federal holiday, approximately 4,000 marchers carrying candles had demonstrated at United Nations Plaza in front of the entrance to the employing establishment to demand that the federal government and medical establishment give a higher priority to finding a cure for acquired immune deficiency syndrome (AIDS). Appellant's regular workday was from 8:00 a.m. to 4:30 p.m. Monday to Friday and the injury occurred at 4:29 p.m.

The employing establishment stated appellant was not in the performance of duty at the time of the injury because "employee had left the work site and departed the building to go home for the day." It controverted continuation of pay on the ground that the "injury occurred off the employing agency's premises and the employee was not involved in official 'off-premise' duties."

The case record contains statements from two eyewitnesses to appellant's injury. One witness, a security guard, stated appellant had slipped on wax "approximately 20 feet outside the doors at 50 United Nations Plaza," and that there was a great deal of wax on many areas of the plaza surface. Both witnesses surmised that appellant had been enroute to the BART (Bay Area Rapid Transit) station when she slipped and fell.

By decision dated July 26, 1985 the Office of Workers' Compensation Programs rejected appellant's claim on the ground that the plaza on which the injury occurred was "not owned, operated, nor controlled by the Federal Government," that appellant was enroute home at the end of the workday, was off federal premises when the injury occurred and was not conducting any official duty.

By letter dated August 15, 1985 appellant's attorney requested reconsideration of the Office's decision. He asserted that the "proximity rule" should apply to appellant's case because the candlelight demonstration by a group titled "Mobilization Against 'AIDS' " constituted a "federal demonstration," that "federal demonstrations are an inherent risk confronting federal employees and Mrs. Wynecoff was *required* by her federal employment to egress from the federal building and confront the wax spilled during the federal rally." Appellant's attorney contended appellant's injury should be compensable because "the hazard which caused her fall was directly related to her employment with the federal government, in that the wax was spilled during a federal protest immediately in front of her place of employment." He asserted the exit used by appellant was the "only exit/entrance to the federal building" and that appellant therefore was required to use that exit on the day of the injury. He acknowledged that the "general public was exposed to the hazard created during the federal protest" but asserted that "this hazard had its origin in the federal protest." Appellant's attorney further asserted that the injury was compensable because appellant at the time of the injury was doing something normally incidental to her employment. He asserted she "was injured in close proximity to the only exit to her building, was being paid by her employer at the time, was utilizing the only means of egress which was a requirement of her job, and the time and manner of her exiting the premises was in accordance with past practice and was done with the knowledge and consent of her employer."

By letters dated September 27 and November 1, 1985 the Office requested a statement from the employing establishment describing the boundaries of its premises, whether appellant was within those boundaries when the injury occurred, and "what control, jurisdiction, or care, if any, your agency or the General Services Administration [GSA] has the right to assume over the precise place where the injury occurred." The Office also requested a diagram showing the boundaries of the federal premises and the location of the injury site. The employing establishment submitted a November 15, 1985 letter from the General Services Administration which states that one of its employees had inspected the location of the fall, that the site was "at a spot outside of the main building entrance on Fulton Street," that the "location of the fall is no closer than 26 feet to the wall of that building," and that the "federal government property line runs one and one-half feet from the wall of the building." The GSA submitted a plot plan which indicated the federal property line. The GSA concluded that appellant had not fallen on federal property.

By decision dated June 18, 1986 the Office denied modification of its June 18, 1986 decision after reviewing the case on the merits. The Office determined that "since Ms. Wynecoff fell at a site approximately 26 feet from the wall of the building, she was not on federal premises when she was injured," that she was "on public property exposed to a risk common to the general public at the time of her fall," was "not within the zone, environment, nor hazards of her work at that time," and that therefore the injury did not arise out of the course of her employment and she was not in the performance of duty at the time of the injury.

The Board finds that appellant's injury was not sustained in the performance of duty.

Under the Federal Employees' Compensation Act an injury sustained by an employee, having fixed hours and place of work, while going to or coming from work is generally not compensable because it does not occur in the performance of duty but out of the ordinary nonemployment hazards of the journey itself which are shared by all travelers. This is in accord with the weight of authority under workers' compensation statutes that such injuries do not occur in the course of employment.[1] However, many exceptions to the rule have been declared by courts and workers' compensation agencies. One such exception, almost universally recognized, is the premises rule: an employee going to or from work is covered under workers' compensation while on the premises of the employer.[2]

The Board has stated:

> "The 'premises' of the employer, as that term is used in workmen's compensation law, are not necessarily coterminous with the property owned by the employer; they may be broader or narrower and are dependent more on the relationship of the property to the employment than on the status or extent of the legal title." [3]

The Board has further stated:

> "The term 'premises' as it is generally used in workmen's compensation law, is not synonymous with 'property.' The former does not depend on ownership, nor is it necessarily coextensive with the latter. In some cases 'premises' may include all the 'property' owned by the employer; in other cases even though the employer does not have ownership and control of the place where the injury occurred the place is nevertheless considered part of the 'premises'." [4]

Another exception to the rule is the proximity rule which the Board has defined by stating that under special circumstances the industrial premises are constructively extended to hazardous conditions which are proximately located to the premises and may therefore be considered as hazards of the employing establishment. The main consideration in applying the rule is whether the conditions giving rise to the injury are causally connected to the employment.[5]

The case record establishes that appellant has fixed hours and place of work and that her injury occurred while she was coming from work. Therefore, unless her injury occurred on the actual or constructive premises of the employing establishment her injury cannot be considered as sustained in the performance of duty. Under the facts of this case there is no evidence, nor does appellant's attorney contend, that appellant's injury occurred on the actual premises of the employing establishment. Appellant's fall occurred after she had exited the federal building housing the employing establishment, had walked at least 20 feet beyond the exit and at least 18 feet beyond the federal property line, and occurred on a plaza over which the employing establishment has no control and which is on public property.

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[1] Larson, Workmen's Compensation Law, section 15.00; *Nancy S. Hardin*, 38 ECAB 285 (1986); *John E. Phifer*, 8 ECAB 77 (1955).

[2] *William L. McKenney*, 31 ECAB 861 (1980).

[3] *Wilmar Lewis Prescott*, 22 ECAB 318 (1971).

[4] *Wilmar Lewis Prescott*, *supra*.

[5] *See William L. McKenney*, *supra;* Larson, *supra.*, section 15.13.

Under the facts of this case it also cannot be said that appellant's injury occurred on the constructive premises of the employing establishment. Appellant fell on the plaza immediately adjacent to the exit from the federal building housing the employing establishment when she slipped on wax which had spilled the previous day during a public demonstration demanding a higher priority from the federal government and medical establishment for finding a cure for acquired immune deficiency syndrome. The Board concludes that the proximity rule does not apply to this case. The spilled wax, if a hazard, was clearly a hazard common to all travelers on the public plaza. Although the wax spilled during a demonstration designed to influence the federal government's prioritization of AIDS research, the wax and demonstration lacked the necessary causal connection to appellant's employment as an accounts examiner for the Department of Education.[6]

Appellant's attorney on appeal asserts *inter alia* that appellant's injury constitutes an "incident of employment" and therefore was sustained in the performance of duty. He cites the case of *Helen L. Guderson* [7] and contends appellant's injury is compensable because it was sustained while she was in close proximity to the only exit from her building, was being paid by her employer at the time, was using the only means of egress which was a requirement of her job, and the time and manner of her exiting the premises was in accord with past practice and done with the knowledge and consent of her employer. In *Gunderson*, however, the Board found that appellant was engaged in a work-related activity, the drinking of coffee, when she was off the employing establishment's premises while in a paid status to obtain coffee and that her injury was therefore compensable. There is no indication in the instant case, however, that appellant was engaged in a work-related activity while off the premises of the employing establishment.

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[6] *See William L. McKenney, supra; John E. Phifer, supra.*

[7] 7 ECAB 288 (1954); 7 ECAB 707 (1955) Memorandum Opinion Denying Petition For Reconsideration.

More analogous to appellant's case is the case of *Gloria C. Adalian* [8] in which the Board rejected the argument that an injury was compensable because the walkway on which it occurred was immediately adjacent to appellant's federal building, it was the customary means of entry to and exit from the building, and the performance of duty required appellant to be on that walkway at the time of injury. In *Adalian* the Board held that the injury occurred while appellant was proceeding to her duty station and before she had reached the employing establishment premises. Similarly, in the instant case the Board finds that appellant fell after she had left her duty station and after she had left the employing establishment premises, that therefore she was subject to the "going and coming rule" and her injury is not compensable. The fact that appellant may have been utilizing the only means of egress from the employing establishment premises when she fell does not alter the public characteristics of the plaza nor warrant that it be considered part of the constructive premises.[9]

The decision of the Office of Workers' Compensation Programs dated June 18, 1986 is hereby affirmed.

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[8] 26 ECAB 131 (1974).

[9] *See Lillie J. Wiley*, 6 ECAB 500 (1954).

In the Matter of EDWARD HOLT *and* DEPARTMENT OF THE ARMY, WALTER REED ARMY MEDICAL CENTER, Washington, DC.

Docket No. 87-1201; Submitted on the Record; Issued November 17, 1987

ORDER DISMISSING APPEAL

Before GEORGE E. RIVERS, DAVID S. GERSON, MICHELE VON KELSCH

By letter dated January 29, 1986, received by the Board on February 3, 1986, appellant's attorney requested the Board review an adverse decision of the Office of Workers' Compensation Programs. The letter did not specify the date of the Office decision or provide other needed information. By letter dated February 6, 1986 the

Board informed appellant's attorney that "[b]efore an appeal can be docketed, additional information is required." The Board provided the attorney with AB-1 Forms, Application for Review, and requested the forms be completed and returned to the Board. The Board stated that "[u]nless we hear from you, no further action will be taken."

On April 7, 1987 the Board received a completed AB-1 Form signed by appellant requesting that the Board review an April 9, 1985 decision of the Office. Appellant stated that the "delay in perfecting this appeal was inadvertent." By letter dated April 23, 1987, received by the Board on April 27, 1987, appellant's attorney stated that the AB-1 Forms "were misfiled by the attorney's office, which accounts for the delay in filing them." He requested that "the letter dated January 29, 1986 be deemed an application for review, which it in fact was and so designated, and was sufficient to toll the statute."

The Board has duly considered the matter. Section 501.3(c) of the Board's Rules of Procedure provides that an incomplete application for review shall be returned to appellant "and a reasonable opportunity" for furnishing additional necessary information shall be allowed.[1] In the instant case appellant did not submit the AB-1 Form until approximately 14 months after his initial January 29, 1986 letter which had been deemed insufficient for the docketing of an appeal. This 14-month period is outside the "reasonable opportunity" to furnish additional information as afforded under 20 C.F.R. section 501.3(c).[2]

Thus, the Board concludes that appellant's completion and filing of the AB-1 Form on April 7, 1987 did not constitute perfection of the appeal retroactively to the date of the initial request for an appeal received by the Board on February 3, 1986.[3] The Board, therefore, has no jurisdiction to review the April 9, 1985 decision as the appeal from this decision was filed on April 7, 1987, more than one year from the date of the April 9, 1985 decision.[4]

Accordingly, IT IS ORDERED that the appeal docketed as No. 87-1201 be and hereby is dismissed.

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[1] 20 C.F.R. section 501.3(c).

[2] *Timothy W. Jennings*, Docket No. 87-482 (issued June 29, 1987).

[3] *Compare Daniel F. McGettigan*, 37 ECAB 863 (1986) in which the Board denied the Director's motion to dismiss finding that a letter received by the Board on December 11, 1985 requesting review of a March 12, 1985 Office decision constituted a timely appeal even though the AB-1 Form was not completed by appellant and filed with the Board until April 1, 1986. The Board found that the completion and filing of the AB-1 Form on April 1, 1986, less than four months after the initial December 11, 1985 appeal request, constituted perfection of the appeal retroactively to December 11, 1985.

[4] 20 C.F.R. section 501.3(d).

In the Matter of ESTHER C. LYNCH *and* U.S. POSTAL SERVICE, POST OFFICE, Riverdale, Md.

Docket No. 87-1542; Submitted on the Record;
Issued November 20, 1987

Before MICHAEL J. WALSH, GEORGE E. RIVERS, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly rejected appellant's claim for compensation benefits on the grounds that she refused to undergo a medical examination as directed by the Office.

On March 13, 1983 appellant, then a 22-year-old mail clerk, filed a claim for compensation alleging that she injured her lower back and abdomen on March 12, 1983 when a chair she was seated in collapsed. Appellant stopped work on March 13, 1983 and returned to work on October 3, 1983 performing light duty. Appellant returned to full duty on January 8, 1984.

Appellant sought immediate medical treatment following the injury from Dr. E. Eisenbrey, an obstetrician who stated "pain in lower abdomen and lower back. Abdomen soft . . . fetus active." In a report dated March 13, 1983 Dr. Eisenbrey also noted that appellant had "fetal distress" and referred appellant to Dr. Francis P. Milone, a Board-certified orthopedic surgeon.

In a report dated May 26, 1983 Dr. Milone stated as follows:

> "[Appellant] has a history of having injured her back and sacral area on May 12, 1983, while working for the United States Postal Office. Apparently a red LSM chair collapsed and she developed pain in the low back and abdominal area. She was evaluated by her obstetrician, Doctor Eisenbrey, for the abdominal complaints and then referred to us for her back complaints. She has been kept off work by Doctor Eisenbrey because of the symptoms that she has and she only has two months left before delivery of her child. She was advised to use the red LSM chair but apparently the seat itself was broken prior to her sitting in the chair and this caused her to come down in a forceful fashion which produced pain in the low back and buttocks region. She has difficulty in the lumbosacral area and sacroiliac joints. She denies any true leg radiculopathy. She has no bowel or urinary effect noted. She has difficulty with flexion because of pain to the low back . . .

> "The examination reveals a polite pregnant lady who has spasms upon palpation to the lumbosacral area. Tenderness is also noted on deep palpation of the sacrum. The reflexes in the knee and ankle groups, the sensory evaluation and motor function of the lower extremities as well as the vascular examination are all within normal limits. She has pain to flexion, extension and left lateral rotation.
>
> "X-rays are not obtained due to her pregnancy status . . .
>
> "She will be treated with controlled bed rest and hot showers at home. She is to remain off work according to both Doctor Eisenbrey and myself until six weeks post-delivery. She cannot take a chance on further aggravating this problem in her present state and therefore she is to be placed on temporary total disability until the time noted."

On June 30, 1983 the Office of Workers' Compensation Programs accepted appellant's claim for low back strain.

On July 28, 1983 appellant gave birth to a child. On October 3, 1983 she was released for light duty, four days a week, six hours a day. In a report dated December 29, 1983 Dr. Milone stated that appellant's back had improved and she could return to full duty effective January 8, 1984. In a report dated March 5, 1984 Dr. Milone stated that appellant could be dismissed from further orthopedic care, and could perform full unrestricted work activities.

On January 2, 1985 appellant filed a claim for recurrence of disability. She stated that she had a stiffness in her lower back during October which gradually worsened in December.

In support of her claim appellant submitted a report dated December 21, 1984 by Dr. Milone which stated as follows:

> "[Appellant] is seen in the office today and relates she has had a recurrence of low back symptoms over the past three months. Additionally she had a miscarriage approximately three weeks ago. The discomfort she has is in the lumbosacral area with left paravertebral pain. She has utilized Tylenol medication which was prescribed by the nursing service at work.
>
> "The examination today shows satisfactory motion of the lumbar spine. She has stiffness of the low back with some aching in the left buttock. The straight leg raising test and reflexes of knee and ankle groups bilaterally are normal. Good motion of the lumbar spine is present. There is palpation tenderness to the left paravertebral area.

> "X-rays of the lumbar spine are satisfactory.
>
> "I believe [appellant] has a low back strain which is related to her work activities and possibly her recent miscarriage . . ."

By letters dated January 28, 1985 and May 29, 1985 the Office requested that appellant submit additional evidence establishing a causal relationship between appellant's current disability and the March 12, 1983 injury.

By compensation order dated April 1, 1986 the Office rejected appellant's claim for recurrence of disability on the grounds that she failed to establish that her recurrence in October 1984 and January 1985 was causally related to factors of her employment.

On May 15, 1986 appellant requested reconsideration of the Office's April 3, 1986 decision. In support of her request for reconsideration appellant submitted a report dated April 25, 1986 by Dr. Milone which stated:

> "[Appellant] was seen by me initially for her low back problem following a fall at work which occurred on May 12, 1983. I saw her on May 26, 1983. All of my evaluations of [appellant] have been for that injury following that fall, and her back problem has been totally due to and unequivocally due to the fall that occurred when she injured her back at work on May 12, 1983.
>
> "When I saw [appellant] on December 21, 1984, and a letter was submitted at that time, I stated in my correspondence that I believed her low back strain was related to her work activities and possibly her recent miscarriage. What I meant was that her back problem is totally and unequivocally related to her compensable work situation. The portion of my statement referable to her 'recent miscarriage' was not the cause of her back condition but possibly contributed to her increased back discomfort. Her back condition is due to the compensable problem and not due to her miscarriage. I stated the miscarriage as a factor of possibly enhancing her low back problem superimposed upon her compensable difficulty."

On July 15, 1986 an Office medical adviser reviewed the case record and, unable to accept Dr. Milone's rationale, decided to refer appellant to a referral physician in order to determine the cause and rationale for appellant's complaints.

On August 29, 1986 the Office referred appellant, together with the case record and statement of accepted facts, to Dr. Hereward S. Cattell, a Board-certified orthopedic surgeon.

In a report dated September 3, 1986 Dr. Cattell reviewed the history of injury as well as his findings upon physical examination. He diagnosed appellant's condition as chronic degenerative disc disease without sciatica and chronic recurrent lumbosacral strain. Dr. Cattell, however, did not provide any statement on whether appellant's current back condition was causally related to the March 12, 1983 injury.

By letter dated November 17, 1986 the Office notified appellant that she had an appointment with Dr. James E. Callan, a Board-certified orthopedic surgeon, on November 28, 1987 for an examination and evaluation on the nature and extent of appellant's disability. The Office notified appellant that refusal to submit to or obstruction of a medical examination would result in suspension of her compensation. If appellant was unable to keep her scheduled appointment then she should notify the Office in writing prior to the date of the employment.

Appellant failed to keep the appointment with Dr. Callan, and neither the Office nor Dr. Callan were notified that she would not keep the appointment.

By letter dated December 15, 1986 the Office notified appellant that she had a new appointment with Dr. Callan, scheduled for January 7, 1987.

On January 7, 1987 appellant telephoned the Office, stating that she was sick and unable to drive to Dr. Callan's office.

According to the record, the Office scheduled another appointment for appellant with Dr. Callan on January 30, 1987. Appellant did not keep the January 30, 1987 appointment with Dr. Callan.

By compensation order dated June 1, 1987 the Office denied appellant's request for a modification of the prior order on the grounds that she refused to undergo a medical examination as indicated by the Office, and that the evidence submitted in support of her application was insufficient to warrant modification of the prior decision.

The Board finds that the Office acted improperly in rejecting appellant's claim for compensation on the grounds that she refused to undergo a medical examination.

Section 8123 of the Federal Employees' Compensation Act authorizes the Office to require an employee who claims disability as a result of federal employment to undergo a physical examination as it deems necessary.[1] Subsection (d) of section 8123 [2] provides:

> "If an employee refuses to submit or obstructs an examination, his right to compensation under this subchapter is suspended until the refusal or obstruction stops. Compensation is not payable while a refusal or obstruction continues and the period of the refusal or obstruction is deducted from the period for which compensation is payable to the employee."

The Office's Federal (FECA) Procedure Manual provides, in Chapter 3-400, Examination, Treatment, and Related Services, paragraph 1:

> "If an employee refuses to submit himself/herself for or obstructs an examination under 5 U.S.C. section 8123, his/her entitlement to compensation is suspended until such refusal or obstruction ceases. It is the responsibility of the Branch of Claims to invoke the provision requiring the suspension of compensation but, before doing so, the injured employee must be advised of the provisions of this section of the Code and given an opportunity to present, in writing, his/her reasons for the refusal or obstruction."

Section 8123 of the Act authorizes the Office to require an employee who claims disability as a result of an employment injury to undergo such physical examination as it deems necessary. The determination of the need for an examination, the type of examination, the choice of locale, and the choice of medical examiners are matters within the provision and discretion of the Office. The only limitation on this authority is that of reasonableness.[3]

The Office referred appellant to Dr. Callan for an orthopedic evaluation on three occasions. Along with its first letter of referral dated November 17, 1986 the Office notified appellant that failure to submit to or obstruction of the medical examination would result in suspension of her compensation benefits. The Office also told appellant that if she was unable to keep her scheduled appointment then she should notify the Office in writing prior to the date of the employment. While the Office did not apprise appellant of the penalty provisions of 5 U.S.C. section 8123(d) in its subsequent referral letters, the Office fulfilled its obligation to appellant by notifying her of the provisions in the November 17, 1986 letter.[4]

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[1] *See* 5 U.S.C. section 8123(a) which provides: "An employee shall submit to examination by a medical officer of the United States, or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at times and places as may be reasonably required."

[2] 5 U.S.C. section 8123(d).

[3] *John J. Wyszynski*, 35 ECAB 1122 (1984); *Lucy L. Allen*, 33 ECAB 1175 (1983).

Appellant failed to keep her scheduled appointments with Dr. Callan, and did not notify the Office, in advance, that she was not going to keep the appointments. The Office therefore would have been in compliance with its established procedures if it had invoked the provisions of 5 U.S.C. section 8123(d) in suspending appellant's possible entitlement to compensation for her refusal to undergo a medical examination as directed by the Office. However, the Office did not issue an order suspending appellant's possible entitlement to compensation benefits. Instead, the Office issued a compensation order rejecting appellant's claim for compensation on the grounds that she refused to undergo a medical examination as indicated by the Office, and that the evidence submitted in support of her application was insufficient to warrant modification of the prior decision. 5 U.S.C. section 8123 states that an employee's entitlement to compensation may be suspended if he/she refuses or obstructs a medical examination. It does not state that an employee's right to compensation benefits can be rejected on the grounds that he/she refuses to undergo a medical examination, as required by the Office. In the present case the Office improperly used 5 U.S.C. section 8123 to reject appellant's claim. In addition, the Office stated that the evidence was insufficient to warrant modification of the prior decision. However, evidence from appellant's treating physician, Dr. Milone, directly related her recurrence of disability to her prior employment-related injury. Thus, further development of the record is mandated under the circumstances of this case.

The decisions of the Office of Workers' Compensation Programs dated April 1, 1986 and June 1, 1987 are hereby reversed and the case remanded for further development and a *de novo* decision.

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[4] *John E. Reiner*, Docket No. 86-727 (issued February 20, 1987).

In the Matter of ORLANDO R. SANTISTEVAN *and* CIVILIAN CONSERVATION CORPS, Albuquerque, N.M.

Docket No. 87-1233; Submitted on the Record;
Issued November 20, 1987

Before DAVID S. GERSON, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether appellant's claim for compensation is barred by the applicable time limitation provision of the Federal Employees' Compensation Act.

On August 29, 1985 appellant, then a 70-year-old former enrollee of the Civilian Conservation Corps, filed a claim for compensation alleging injury on March 21, 1937 to his face and eyes when a pressure cooker exploded. In support of his claim, appellant submitted an April 28, 1977 witness statement concerning the March 21, 1937 incident, a June 2, 1953 letter from the Veterans Administration which provided appellant with the address of the Bureau of Employees' Compensation, and a statement, received by the Office on August 26, 1985, in which appellant indicated that he previously filed a letter with the District Commander of the Civilian Conservation Corps in 1941 and had been advised the Corps would send the letter to the Bureau.

By letter dated October 4, 1985 the Office advised appellant that benefits payable under the Federal Employees' Compensation Act were payable to an enrollee of the Civilian Conservation Corps for any claim, as a result of traumatic injury by accident while in the performance of duty, which was filed within one year after the date of injury. The Office noted that since no prior claim had been filed by appellant, no authority existed to give consideration to appellant's claim.

On December 10, 1985 appellant submitted a copy of an affidavit dated September 13, 1941 in which he noted that his injury occurred March 21, 1937 and was witnessed by his supervisor and a fellow employee. Appellant also submitted an August 23, 1941 letter from the district commander of the Civilian Conservation Corps which requested that appellant furnish a sworn statement regarding the time, date and circumstances surrounding his injury.

On January 8, 1987 an Office claims examiner noted that microfilm records revealed that a letter file was created on May 11, 1959 regarding the injury alleged by appellant; however, since no formal notice of injury was submitted no official file was created and the letter file was subsequently destroyed.

By letter decision dated March 5, 1987 the Office rejected appellant's claim finding that it was not filed within the time limitation set by the Federal Employees' Compensation Act. In an attached memorandum, dated February 19, 1987, an Office claims examiner noted that the first notification that any injury had occurred was in 1959 when appellant wrote a letter of inquiry to the Bureau of Employees' Compensation and that appellant had produced no evidence contemporary to the injury to indicate that it had been reported in an official manner or to establish that appellant's official supervisor had actual timely knowledge of the injury.

The Board finds that the Office properly determined that appellant's claim was barred by the time limitation provision of the Federal Employees' Compensation Act.

Appellant's claim for compensation benefits is governed by the provisions of the Federal Employees' Compensation Act of June 28, 1937 [1] which extended the benefits of the Act of February 15, 1934,[2] as amended, to enrollees of the Civilian Conservation Corps.[3] Section 17 of the Act, applicable to the instant case, provides:

> "That unless notice is given within the time specified or unless the immediate superior has actual knowledge of the injury, no compensation shall be allowed, but for any reasonable cause shown, the commission may allow compensation if the notice is filed within one year after the injury."

The Board has held that the requirement that a claim be filed within the specified time period is mandatory and that a claim not filed within one year after the date of injury cannot be considered.[4] In *Kathryn A. O'Donnell* [5] the Board stated:

> "Sections 15 to 16 of the Act deal with the timely giving of notice while section 17 relates more to consequences where timely notice is not given. These sections are in the Act primarily as a protection to the government against the difficulty, and sometimes impossibility, of processing stale claims. They are designed, as the language indicates, for the purpose of in-

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[1] Act of June 28, 1937, ch. 383, 50 Stat. 321 (1937).

[2] Act of February 15, 1934, ch. 13, 48 Stat. 351 (1934).

[3] *Noe Martinez*, 11 ECAB 30 (1959).

[4] *Ernest Depathy*, 2 ECAB 232 (1949).

[5] 7 ECAB 227 (1954).

> forming the government upon the occurrence of an injury in order that the interests of all may be protected through discovery of relevant facts by prompt investigation and in order that appropriate services and compensation benefits may be properly furnished. They establish a procedure to be followed and fix a maximum period during which such injuries may be brought within the scope of the Act for inordinate delay in giving notice could well result in material prejudice to the interests of the Government, as well as those of the employee." [6]

The Board noted that entitlement to compensation under the Act is not automatic nor absolute but is subject to conditions imposed by the Government which must be met by the injured employee or his representative.[7] The maximum time limit applicable to this case was one year and the evidence of record establishes that appellant did not file a claim for compensation with the Office until August 29, 1985, more than 48 years after his injuries. For this reason, appellant's claim for compensation was not timely filed within the applicable time limitation provision of the Act.

Even though appellant forfeited his right to monetary compensation by his failure to file a timely claim, he would be entitled to medical benefits under the Act for any causally related condition if it were established that his immediate superior had actual knowledge of the injury and of its employment relation or timely written notice of such injury was given within 48 hours.[8]

Appellant advised the Office that his immediate superior was present at the time of injury on March 21, 1937; however, appellant has not submitted any evidence which supports his allegation.[9] The case record demonstrates that appellant did not file a written notice of the injury with the Office until May 11, 1959 at the earliest, more than 22 years after the March 21, 1937 incident. In view of the foregoing, the Board finds that appellant's supervisor did not have actual knowledge of timely written notice of injury within 48 hours. Therefore, the Office properly determined that appellant was not entitled to medical benefits under the Act.

The March 5, 1987 decision of the Office of Workers' Compensation Programs is affirmed.

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[6] *Id.* at 230.

[7] *Id.* at 231.

[8] 5 U.S.C. section 15-17 (1916), as amended. *See Edward T. Lowery*, 8 ECAB 745 (1956); *Harold A. Leaphart*, Docket No. 86-107 (issued February 19, 1986).

[9] Mere knowledge of an employee's illness and disablement for work is not sufficient to satisfy the notice requirements of the Act, which contemplate information conveyed to a superior reasonably calculated to put him on notice of possible injury or disease of occupational origin. *See Russell H. Renner*, 12 ECAB 556 (1961).

In the Matter of ROBERT L. SMITH *and* DEPARTMENT OF THE NAVY, NAVAL SEA SYSTEMS COMMAND, Crane, Ind.

Docket No. 87-1287; Submitted on the Record;
Issued November 23, 1987

Before GEORGE E. RIVERS, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant forfeited his right to compensation for the period May 8, 1983 to May 7, 1984 under section 8106(b)(2) of the Federal Employees' Compensation Act; (2) if so, whether the Office properly found that appellant was not "without fault" with respect to creating a $13,650.70 overpayment in the amount of the forfeited compensation and that the overpayment therefore is not subject to waiver; and (3) whether the Office properly required recovery of the overpayment by a salary offset of $80.00 per month.

On November 5, 1975 appellant, then a 25-year-old ordnance worker, injured his low back while "lifting heavy materials." He stopped work the same day.

The Office of Workers' Compensation Programs accepted appellant's claim for lumbosacral strain and authorized continuation of pay during his absence from work. Appellant returned to light duty on December 22, 1975.

On February 19, 1976 appellant again stopped work alleging a recurrence of disability.

Effective April 29, 1976 the Office placed appellant on the "automatic roll" in order that he would receive regular compensation checks every four weeks. By letter dated May 17, 1976 the Office informed appellant of the amount of compensation he was to receive each four weeks and the terms of payment. The letter advised appellant that if he returned to his former job or obtained other employment to provide the following information to the Office: the name and address of the employer, the date he returned to work, the type of work he was performing, his weekly pay rate, and the number of hours worked per week. The letter specifically stated "ANY COMPENSATION CHECKS YOU RECEIVE AFTER YOU RESUME WORK MUST BE RETURNED TO US."

By CA-1032 form letters dated January 24, 1978, July 21, 1978, November 28, 1979, June 4, 1981, April 12, 1983 and April 19, 1984, the Office requested appellant to report any and all employment during the past 12 months or since his last employment and pay was reported to the Office. It noted that he "must account for an entire time to include all periods of part-time employment." Appellant completed the forms respectively on February 2, 1978 and reported "none" indicating that he was not employed; on July 28, 1978 he did not answer the question regarding employment; on December 3, 1979 he reported "none"; on June 17, 1981 he did not answer the question; on April 18, 1983 he did not answer the question; and on May 7, 1984 he reported "none." On December 5, 1984 the Office sent appellant another CA-1032 form requesting him to answer questions concerning a number of factors, including his employment status during the preceding 15 months. Appellant completed the form on December 27, 1984 stating that he was employed from January to October 1984 as a cashier at a self-serve gas station, for 12 to 20 hours a week at a rate of $3.35 per hour.

Appellant returned to work at the employing establishment on March 4, 1985 in a different position, obtained through reemployment efforts of a vocational rehabilitation program.

By inquiry dated March 7, 1985 the Office requested appellant to furnish additional information concerning his work during 1984, and to explain why he did not inform the Office of such employment on the CA-1032 form completed on May 7, 1984.

A March 24, 1985 statement from the secretary/treasurer at C.E. Taylor Oil Company indicated that appellant had worked there an average of 19 hours per week from December 11, 1983 through November 11, 1984 as a cashier at a self-serve gasoline station at a rate of $3.35 per hour. In addition the statement noted that appellant "quit because he was told he was not to be working. A gov't [government] employee had told him he could work then another later said he could not."

In an undated statement, received by the Office on May 1, 1985, appellant acknowledged that he had worked from January to October 1984 but overlooked reporting it on the May 1984 form. He stated that he telephoned the Office but was put on hold. He further stated that he did not realize that he could not work part time.

The Office issued a preliminary determination on August 9, 1985, finding that an overpayment of compensation in the amount of $13,650.70 had occurred because appellant forfeited his right to compensation for the period May 8, 1983 through May 7, 1984 due to the submission of a false report of employment on form CA-1032 dated May 7, 1984. Appellant was found with fault in the matter because he knew of his responsibility to report all work but reported "none" for the statement covering the period May 8, 1983 through May 7, 1984.

Appellant completed Office form "OWCP-20" (overpayment recovery questionnaire) on September 4, 1985 which listed a total net monthly income of $1,100.00 based on his income of $800.00 with the employing establishment and his wife's income of $300.00; listed total expenses of $1,541.50; and listed total cash assets of $2,014.00. Appellant contended that he was without fault regarding the overpayment because he was "never informed of how . . . to fill out the forms." Appellant further stated that "It would be an extreme hardship to have to repay $13,650.70" but he "would be willing to try to pay back the $1,874.27" that he earned from his part-time job.

At appellant's request, a hearing was held before an Office hearing representative on September 3, 1986. At the hearing, appellant testified that he earned approximately $1,874.27 while working at C.E. Taylor Oil Company. He argued that it was inequitable to require him to forfeit $13,650.70 in compensation benefits. Appellant stated that he had attempted to contact the Office to inquire about reporting his employment; and submitted a page of his telephone bill which reflected a telephone call on May 2, 1984 to the Office. Also submitted at the hearing was an August 22, 1985 statement from C. E. Taylor Oil, Inc. which indicated that appellant was employed there from January 1 to September 1, 1984 and earned $1,874.27 during that period.

By decision dated March 27, 1987, finalized on April 1, 1987, the Office hearing representative found that appellant had forfeited his entitlement to compensation benefits for the period May 8, 1983 to May 7, 1984, which resulted in an overpayment of $13,650.70; that appellant was not without fault in creating the overpayment; and that $3,468.88 of the overpayment would be compromised, and the balance of $10,181.82 would be recovered through a ten percent offset from appellant's continuing federal salary.[1]

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[1] The hearing representative also noted that appellant indicated that he had a loss of wage-earning capacity effective March 4, 1985 when he returned to work at the employing establishment; thus the Office was directed to adjudicate this issue. As this issue has not yet been adjudicated by the Office, it is not currently before the Board on this appeal. 20 C.F.R. section 501. However, upon return of the case record the Office should adjudicate this issue.

With respect to the first issue, the Board finds that appellant has forfeited his right to compensation for the period April 19, 1983, through May 7, 1984.

Section 8106(b) of the Federal Employees' Compensation Act,[2] in pertinent part, states as follows:

> "The Secretary of Labor may require a partially disabled employee to report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at times the Secretary specifies. * * * An employee who— '(1) fails to make an affidavit or report when required'; or '(2) knowingly omits or understates any part of his earnings; forfeits his right to compensation with respect to any period for which the affidavit or report was required. Compensation forfeited under this subsection if already paid, shall be recovered by a deduction from the compensation payable to the employee or otherwise recovered under section 8129 of this title, unless recovery is waived under that section.' "

In this case, appellant contends that he was not aware of the procedures for reporting his employment. However, the record reveals that the Office specifically informed appellant on May 17, 1976 that if he obtained employment that he must report such to the Office, as well as return any compensation checks received after he resumed work. Thus, appellant was aware that he had to report any employment to the Office. By form CA-1032 dated April 19, 1984 the Office requested appellant to report all employment and earnings for the preceding twelve months or since his previous report of employment and earnings including part-time employment. Appellant completed the form and stated "none" regarding employment. However, the record reveals that appellant actually was working as a cashier in a self-serve gasoline station at that time.

Under these circumstances, the Office properly determined that appellant had knowingly failed to report earnings from employment and that pursuant to the provision of section 8106(b), his failure resulted in forfeiture of his right to compensation for any period for which a report was required. In *Charles A. Griffin,*[3] the Board stated that if the employee "had *any* earnings from employment or self-employment during the period covered by the report, he would not be entitled to compensation for any portion of the period covered by the report." In the instant case, appellant completed a report of employment on April 18, 1983. He completed another report on May 7, 1984. Thus the report completed by appellant on May 7, 1984 covered the period retroactive to April 19, 198 as his previous report of employment was dated April 18, 198 Since appellant began working in January 1984 (or possibly early as November 11, 1983) and was required to report his emplo ment but failed to do so, the forfeiture provision applies to the entire period covered by the report, i.e., April 19, 1983 to May 7, 1984.[4]

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[2] 5 U.S.C. section 8106(b).

[3] 22 ECAB 94 (1970).

The Board further finds that appellant is not "without fault" with respect to the resulting overpayment and therefore the overpayment is not subject to waiver.

Section 8129(a) of the Act [5] provides that when an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience." No waiver of overpayment is possible if the claimant is not without fault in helping to create the overpayment.

In determining whether an individual is "without fault," what constitutes "fault" depends on whether the facts show an incorrect payment resulted from:

> "(a) An incorrect statement made by the payee which the payee knew or should have known to be incorrect; (b) Failure of the payee to furnish information which the payee knew or should have known to be material; or (c) Acceptance of a payment which the payee either knew or should have been expected to know was incorrect." [6]

In the present case it is apparent that the Office applied the first two standards—an incorrect statement made by the payee which the payee knew or should have known to be incorrect, and failure of the payee to furnish information which the payee knew or should have known to be material—in finding appellant at fault in creating the overpayment.

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[4] *Robert Sullivan*, Docket No. 87-732 (issued August 28, 1987).

[5] 5 U.S.C. section 8129(a).

[6] Pursuant to *Califano v. Yamasaki*, 422 U.S. 682, 99 S. Ct. 2545, the Office established procedures to be followed in handling overpayment of compensation cases. These procedures are detailed in the Federal (FECA) Procedure Manual, Chapter 2-901, Overpayments, Part 2-claims.

Appellant completed and returned the CA-1032 form on May 7, 1984 stating that he had no employment and earnings during the period covered by the form. Since appellant was actually working at the time that he stated that he had no employment or earnings, he knew this statement was incorrect. Moreover, appellant was advised by the Office on June 30, 1981 that he must notify the Office when he returned to work or obtained other employment. Thus, appellant should have known that this information was material, yet he failed to furnish the information regarding his employment. Therefore, the Board finds that appellant was not without fault in creating the overpayment because he made an incorrect statement which he knew was incorrect and he failed to furnish requested information that he should have known to be material.

Upon return of the case record the Office shall recompute the amount of the overpayment for the period April 19, 1983 through May 7, 1984.

With respect to the third issue, the Board finds that it does not have jurisdiction to consider the method of recovery of the overpayment.

The Office hearing representative compromised a portion of the overpayment and determined that the balance should be recovered by offsetting ten percent of appellant's federal salary. This method of recovery is provided for under the Debt Collection Act of 1982, whereas the Board's jurisdiction is limited to appeals from final decisions of the Office arising under the Federal Employees' Compensation Act.[7]

The Board notes that the Debt Collection Act of 1982 [8] provides that debts owed to a federal agency may be collected by periodic offsets against the salary of a debtor who is employed by another federal agency. The Department of Labor's regulations covering salary offset were published in the Federal Register on February 5, 1987 and became effective March 9, 1987.[9] Under the procedures established by the Debt Collection Act, collection techniques were developed for deducting from the current pay account of a federal employee a "salary offset" when the employee owes money to the United States. In FECA Bulletin No. 87-35, the Office of Workers' Compensation Programs implemented the Department's regulations to require other federal agencies to make regular deductions from the employee's salary to satisfy an outstanding debt.[10]

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[7] *See* 20 C.F.R. section 501.2(c).

[8] Debt Collection Act, 5 U.S.C. section 5511 *et seq.*, Pub. L. 97-365.

[9] 52 Fed. Reg. 3,772 (February 5, 1987) (to be modified at 29 C.F.R. Part 20).

The Board notes that decisions made by the Office under the Debt Collection Act are reviewable by the Office of the Administrative Law Judge under 20 C.F.R. Part 18. For this reason the Board does not have jurisdiction to review the discretionary authority of the Office with regard to the method of recovery provided under the Debt Collection Act as this involves an offset against the salary of a federal employee as opposed to recovery made against continuing compensation benefits of an employee.[11]

The decision of the Office of Workers' Compensation Programs dated March 27, 1987 and finalized on April 1, 1987 is affirmed with respect to the finding of a forfeiture and the finding of fault; it is modified with respect to the period of forfeiture and the amount of the overpayment and affirmed as modified.

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[10] FECA Bulletin No. 87-35 (issued April 24, 1987).

[11] *Jesse L. Green*, 39 ECAB 174 (1987).

In the Matter of KENNETH W. GRANT *and* TENNESSEE VALLEY AUTHORITY, Chattanooga, Tenn.

Docket No. 86-1604; Submitted on the Record;
Issued November 24, 1987

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether appellant has established that he was a civil employee of the United States within the meaning of the Federal Employees' Compensation Act at the time of his injury on June 7, 1984.

On October 4, 1985 appellant filed a claim for an injury to his cervical spine sustained on June 7, 1984 when he fell off a stool while lifting a box and the falling box hit him.

The Tennessee Valley Authority controverted appellant's claim on the basis that he was employed by Professional Temporary Services at the time of his injury and that he was not an employee of the Tennessee Valley Authority. A copy of the October 1, 1983 contract for personal services between Tennessee Valley Authority (TVA) and Professional Temporary Services was submitted. Pertinent sections of this contract provide that Professional Temporary

Services would provide its employees to render services to TVA in specified areas, that TVA would pay Professional Temporary Services which would pay its personnel at prevailing hourly rates for specified grades of TVA employees,[1] "that TVA shall determine the appropriate hourly rate based on the level of services to be performed," that TVA would determine when service was unsatisfactory and that no charge would be made for such services, that time spent in the performance of services and related travel would be paid "in accordance with TVA regulations to the same extent and under the same conditions as in the case of hourly rated TVA employee performing similar services and related travel and supplementary payments for overtime and holiday work shall be made on the same basis," that Professional Temporary Services' employees would not accrue or receive from TVA annual, sick or other leave, and that Professional Temporary Services' employees who did not meet TVA's security standards would not be permitted to perform services for TVA.

Section seven of the contract provides "[Professional Temporary Services] shall maintain Workers' Compensation Insurance for its employees as required by applicable law, and the rates paid by TVA under this contract include the cost of such insurance."

In a December 10, 1985 letter to the Office of Workers' Compensation Programs appellant's attorney stated that appellant had already received workers' compensation benefits from Professional Temporary Services' insurance carrier, that he had advised the carrier of appellant's claim filed with the Office, that appellant was not seeking a double recovery and appropriate reimbursement would be made, that the claim was filed with the Office because it appeared appellant would be entitled to a greater amount of benefits under the Federal Employees' Compensation Act, and that TVA appeared to meet all the indicia of being appellant's employer.

By a compensation order dated February 20, 1986 the Office found that appellant was not a civil employee of the United States at the time of his injury.

Appellant's attorney requested reconsideration and submitted a March 13, 1986 affidavit from appellant stating that all the work he performed was on behalf of TVA, that Professional Temporary Services was not hired to perform a specific job or task for TVA, that he never reported to Professional Temporary Services but rather directly to TVA, and that TVA assigned his tasks, instructed him how to perform them, and had complete control over his activities including the number of hours worked. In his request for reconsideration appellant's attorney contended that appellant was an employee of TVA, that TVA could not by contract lessen appellant's entitlement to benefits, and that TVA and Professional Temporary Services intended to enter a contract to make Professional Temporary Services responsible for all injuries but that they had not done so for temporary federal employees such as appellant.

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[1] TVA agreed to reimburse Professional Temporary Services at the rate of 14.9 percent of the man-hour costs pursuant to the contract for overhead costs.

By compensation order dated April 30, 1986 the Office found the additional evidence insufficient to warrant modification of its prior decision.

The Board finds that appellant has not established that he was a civil employee of the United States within the meaning of the Federal Employees' Compensation Act at the time of his injury on June 7, 1984.

The term "employee" is defined in the Federal Employees' Compensation Act.[2] However, there are cases where it is necessary to go beyond the statutory definition and make the determination whether a particular worker comes within the Act's coverage by resorting to the facts and circumstances of the particular employment and applying the well-known principles respecting the existence of an employer-employee relationship.[3]

In cases where the question was whether a particular worker was an employee of the United States or of an independent contractor, the Board has held that factors to be considered in resolving this issue include right of control of the work activities, the right to hire and fire, the nature of the work performed, the method of payment for the work, the length of time of the job, and the intention of the parties.[4] These factors, and the Board's holding in these cases that the most important factor is the right to control the work activities of the person whose status is in dispute, are derived from section 44.00 to 45.32 of *Larson's Workmen's Compensation Law*. These principles, however, are not applicable to all individuals whose employment status is in dispute.[5]

Larson's Workmen's Compensation Law specifically deals with the status of workers such as appellant in section 48, titled "Lent employees and dual employment," and states "There can be no compensation liability in the absence of a contract of hire between the employee and the borrowing employer." [6] In the present case the evidence does not establish that there was a contract of hire between appellant and the Tennessee Valley Authority. Professional Temporary Services was in the business of furnishing employees, and hired appellant.[7] Professional Temporary Services then provided the Tennessee Valley Authority with appellant's services pursuant to a contract between Professional Temporary Services and the Tennessee Valley Authority. This contract provided that appellant would be the employee not of TVA but of Professional Temporary Services which would pay appellant and would also "maintain Workers' Compensation Insurance for its employees as required by applicable law."

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[2] 5 U.S.C. section 8101(1).

[3] *Funnia F. Hightower*, 28 ECAB 83 (1976).

[4] E.g. *Barbara Andrews*, 26 ECAB 361 (1975); *June M. Beswick (John D. Beswick)*, 22 ECAB 252 (1971).

[5] In *Robert W. Moen*, 31 ECAB 530 (1980) the Director of the Office filed a motion to reverse and remand the case, stating the "control" test should not be applied to individuals receiving no payment for their services. The Board granted the Director's motion.

Appellant has shown that he worked only at the Tennessee Valley Authority while employed by Professional Temporary Services, and that TVA employees directed and controlled his work activities there. There is no evidence, however, on how long appellant worked at TVA, and no evidence whether Professional Temporary Services could have assigned appellant to another employer or whether it provided employees only to TVA. In the absence of such evidence and in light of the presumption that the worker continues to be the employee of the general employer,[8] here Professional Temporary Services, the Board finds that appellant has not met his burden of establishing that he was an employee of the United States at the time of his injury on June 7, 1984.[9]

The decisions of the Office of Workers' Compensation Programs dated February 20, 1986 and April 30, 1986 are affirmed.

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[6] Section 48.10.

[7] For a discussion of cases involving general employers in the business of furnishing employees, see *Larson's Workmen's Compensation Law* section 48.23 which points out that where a general employer merely arranges for labor, "the majority of the cases hold that the worker becomes the employee of the special employer, although there is substantial *contra* authority."

[8] See *Larson's Workmen's Compensation Law* section 48.10.

[9] A claimant has the burden to establish all the necessary elements of the claim, including that he was a civil employee of the United States.

In the Matter of HELEN S. FORMAN, claiming as widow of LAWRENCE T. FORMAN, *and* THAILAND-UNITED STATES EDUCATIONAL FOUNDATION, Bangkok, Thailand

Docket No. 86-1219; Hearing August 13, 1987;
Issued November 25, 1987

Appearances: *Thomas R. Hurd, Esq.*, for appellant; *Sheldon G. Turley, Jr., Esq.*, for the Director, Office of Workers' Compensation Programs.

Before DAVID S. GERSON, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly excluded from its computation of the employee's monthly pay for purposes of disability compensation and death benefits the payment of school fees for the employee's children, which payment had been a provision of the employee's contract with the employing establishment.

On January 3, 1983, the employee, then the 44-year-old executive director of the employing establishment, sustained a severe brain stem injury, severe cerebral concussion and an acute subdural hematoma when he fell through the roof of a walkway while in the performance of duty. On July 20, 1984 the employee's wife filed a claim for disability compensation on behalf of the employee. The employee did not regain consciousness following the injury and died on April 25, 1985 due to respiratory arrest. Dr. Pracha Prichayudh, the employee's attending physician who is a neurosurgeon, reported on November 11, 1985 that the severe cerebral contusion, primary brain stem injury and the subdural hematoma were contributory causes of death and that the death was due to the employment injury.

The case record shows that the Thailand-United States Educational Foundation is funded entirely by the United States Information Agency and is controlled by a Board of Directors to whom the employee was accountable. The employee's contract with the Foundation set forth his annual salary, provided a monthly housing allowance in Bangkok, the place of employment, and provided *inter alia* for the "payment of school fees for children."

By letter dated April 17, 1985 the Office of Workers' Compensation Programs informed the employee's attorney that the claim had been accepted. After receiving information from the employing establishment concerning the employee's annual salary and monthly housing allowance, the Office by letter decision dated June 11, 1985 paid to the employee's widow, the appellant, compensation for the employee's total disability for the period August 15, 1983[1] through April 24, 1985, the date of death. The Office did not include in its computation of monthly pay the payment of school fees.

Appellant filed a claim for compensation for herself and the employee's dependent children based on the death of the employee. By letter dated July 12, 1985 appellant's attorney indicated that it was his understanding following a conversation with an Office official that the Office was "reviewing whether tuition payments made on behalf of the Forman children should be included in Mr. Forman's salary."

By decision dated February 4, 1986 the Office accepted the claim for death benefits and informed appellant that she would receive monthly compensation of 45 percent of the employee's monthly pay and that her two sons would each receive 15 percent. The Office computed the employee's monthly pay as $2,303.83 using his annual salary divided by twelve plus his monthly housing allowance. The Office did not include in the monthly pay the "payment of school fees" set forth in the employee's contract with the employing establishment. The Office explained that compensation would be paid every four weeks in the amount of $1,650.46.

By letter dated February 13, 1986 appellant's attorney asserted that "Mr. Forman's employment contract provided that his compensation included payment of school fees for his children" and that such amount should have been included in the Office's computation of the employee's monthly pay.

In an April 15, 1986 memorandum in the case record the Office stated it had previously advised the attorney that there was "no provision to allow for benefits greater than that paid" and no provision for "additional compensation toward the education of dependent children."

On appeal before the Board appellant's attorney asserts that "[d]espite the fact that the decedent's employment contract provided that his compensation was to include school fees for his children, the Office of Workers' Compensation Programs refused to include the tuition allowance as part of Mr. Forman's income in determining FECA benefits," and that such refusal "violates the Federal Employees' Compensation Act."

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[1] The employing establishment had terminated the employees' salary on August 15, 1983.

The Director of the Office filed a memorandum in justification of his February 4, 1986 decision in response to a Board request for a legal memorandum. The Director asserts that the Office "properly determined the employee's monthly pay upon which it based the payment of death benefits to appellant, his widow." The Director further asserts that the "employee's contract provided for payment of tuition pursuant to the statutory authority of 5 U.S.C. section 5924(4), which authorizes this cost-of-living allowance for employees in a foreign area," and that "[t]hese payments . . . are *clearly* examples of 'an allowance authorized outside the United States,' and as such are excluded from monthly pay under 5 U.S.C. section 8114(e)(2)."

Appellant's attorney replied to the Director's memorandum contending that "the payment of the children's school fees, assumed by the Foundation under its contract with decedent . . . should be included in the calculation of the decedent's monthly pay as a form of 'remuneration in kind for services' pursuant to 5 U.S.C. section 8114(e)." Appellant's attorney further contends that "[n]owhere in the employment contract or in the record does it state that the tuition payments were a cost-of-living allowance or that they were made pursuant to 5 U.S.C. section 5924(4)," and that "[m]oreover it appears that Mr. Forman could not have received the payments for tuition pursuant to section 5924 because he did not satisfy the prerequisites for payments under section 5924." Appellant requested oral argument before the Board.

The terms of the Federal Employees' Compensation Act are specific as to the method and amount of payment of compensation; neither the Office nor the Board has the authority to enlarge terms of the Act nor to make an award of benefits under any terms other than those specified in the statute. Unless appellant's contentions are in keeping with the scope or intent of the Act, i.e., unless the statute authorizes payment of the kind requested by appellant, the Office's denial of such request must be affirmed.[2]

The applicable provisions of the Act specify that compensation for disability shall be computed on the basis of the employee's monthly pay as defined in the Act.[3] There is no authority for computing compensation on any other basis.[4] Section 8114(e) of the Act concerning monthly pay states as follows:

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[2] *Helen A. Pryor*, 32 ECAB 1313 (1981).

[3] *See* 5 U.S.C. section 8101(4) and 8114.

[4] *Helen A. Pryor*, *supra*.

> "The value of subsistence and quarters, and of any other form of remuneration in kind for services if its value can be estimated in money, and premium pay under section 5545(c)(1) of this title are included as part of the pay, but account is not taken of—
>
> (1) overtime pay;
>
> (2) additional pay or allowance authorized outside the United States because of differential in cost-of-living or other special circumstances; or
>
> (3) bonus or premium pay for extraordinary service including bonus or pay for particularly hazardous service in time of war."[5]

The question therefore becomes whether the payment of school fees for the employee's children constitutes "additional pay or allowance authorized outside the United States because of differential in cost-of-living or other special circumstances," which is excluded from monthly pay under the Act or whether, as contended by appellant's attorney, the payment of school fees constitutes "any other form of remuneration in kind for services if its value can be estimated in money" which is included in monthly pay under the Act.

The Board finds that the payment of school fees for the employee's children constitutes additional pay or allowance authorized outside the United States because of differential in the cost-of-living. The Board further finds that the Office therefore properly excluded from its computation of the employee's monthly pay for purposes of disability compensation and death benefits the payment of school fees for the employee's children, which payment had been a provision of the employee's contract with the employing establishment.

In order to characterize the payment of school fees for the children of the employee, it is necessary to consider the statutory basis for the payment of such fees. The authority for the payment of school fees for the dependents of an employee of a government agency who works overseas is found in 5 U.S.C. Chapter 59, Subchapter III, entitled "Overseas Differentials and Allowances." [6] Section 5924 of this Subchapter states in pertinent part as follows:

> "The following cost-of-living allowances may be granted, when applicable, to an employee in a foreign area:

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[5] 5 U.S.C. section 8114(e).

[6] 5 U.S.C. sections 5921 to 5926.

* * *

> "(4) An education allowance or payment of travel costs to assist an employee with the extraordinary and necessary expenses, not otherwise compensated for, incurred because of his service in a foreign area or foreign areas in providing adequate education for his dependents * * *" [7]

Since 5 U.S.C. section 5924(4), the basis for the payment of an education allowance to an employee of a government agency who works overseas, clearly characterizes such payment as a cost-of-living allowance, such payment is excluded from the computation of the employee's monthly pay pursuant to 5 U.S.C. section 8114(e)(2).

Appellant's attorney contends the payment of school fees constitutes "any other form of remuneration in kind for services" which value is included in the computation of monthly pay if its value can be estimated in money. Such characterization of the *payment* of school fees, however, is not consistent with the common definition and usage of "in kind." "In kind" has been defined as "in the same kind, class or genus; of the same class, description or kind of property" [8] or "with produce or commodities" rather than with money: pay in kind.[9] Since the *payment* of school fees involved the payment of money and not the payment in a kind of property or commodity, such as for example the provision of free tuition at a school operated by the employing establishment, it does not constitute remuneration in kind and is therefore not included in the employee's monthly pay.

The decisions of the Office of Workers' Compensation Programs dated June 11, 1985 and February 4, 1986 are hereby affirmed.

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[7] 5 U.S.C. section 5924(4).

[8] 42 C.J.S. 477.

[9] The American Heritage Dictionary—New College Edition, 1976.

In the Matter of MU-HYANG KU, claiming as widow of CHIN-KYU KIM *and* DEPARTMENT OF THE ARMY, STORAGE FACILITY, Pusan, Republic of Korea

Docket No. 87-1070; Submitted on the Record;
Issued November 27, 1987

Before DAVID S. GERSON, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined the amount of appellant's compensation under section 8135(a)(2) of the Federal Employees' Compensation Act.[1]

On March 18, 1986 appellant filed a claim for death benefits, asserting that the February 28, 1986 death of her husband, a citizen and resident of the Republic of Korea, was causally related to factors of his federal employment. The employee, an oiler, died in an accident during a military exercise while performing his assigned duty on a self-elevating pier barge. A death certificate filed with the claim stated the employee died of cardiopulmonary arrest, from a foreign-body obstruction of his airway, while drowning. Appellant submitted documentation relating to burial expenses and the employing establishment submitted relevant pay data for the employee.

In a May 19, 1986 memorandum, an Office claims examiner computed appellant's entitlement to death benefits under both the Federal Employees' Compensation Act (FECA) and the Korean Labor Standard Act (KLSA). The claims examiner noted that the employee's monthly pay was $670.50, and calculated appellant's entitlement as a widow to be $335.25 per month. Applying the 60 months limitation in 5 U.S.C. section 8135(a), the claims examiner determined that appellant would be entitled to a lump sum, including funeral expenses and an administrative allowance, totaling $21,115.00 under the FECA. Applying the KLSA, the claims examiner determined that appellant would be entitled to a combined compensation and burial benefit payment of $33,746.40. Comparing these two amounts, the claims examiner selected the $21,115.00 figure payable under the Act as the amount due appellant pursuant to the Office's regulations at 20 C.F.R. section 25.2(e) (1986).

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[1] 5 U.S.C. section 8135(a)(2).

By compensation order dated July 11, 1986, the Office accepted appellant's claim for death benefits, and awarded her a lump sum under the FECA in the amount of $21,115.00.

By letter dated August 6, 1986 the employing establishment civilian personnel officer noted that communication with the employing establishment director of civilian personnel revealed:

> "Department of Labor determined that the disability or death benefits of Korean employees are paid in accordance with the ROK Labor Standard Law instead of by use of the Federal Employees' Compensation Act . . ."
>
> "The law cited above prescribes that the claimant is entitled to the compensation of 1,000 days average wage and the total compensation payable to the claimant would be $30,960 for death on duty (computation made based on the daily wage of $30.96 . . .) and $2,319.00 funeral expense . . . as . . . was previously submitted to your office for reimbursement. This office has not received the treasury check in the amount of $21,115.00 . . . which was mentioned in the compensation order enclosed to your letter of July 11, 1986.
>
> "This check will be kept . . . until . . . we receive the supplemental amount of compensation from your office . . ."

By letter dated September 4, 1986 the Office provided a series of memoranda which clarified the method the Office employed in paying compensation in this claim. The Office noted that the March 7, 1985 instruction from the Associate Director for Federal Employees' Compensation Act was controlling and was followed.[2] The Office explained:

> "In this case, the KLSA burial allowance and the KLSA death benefit would each have individually exceeded the corresponding benefit under general provisions of the FECA, and total compensation under the KLSA would have exceeded total compensation payable in accordance with FECA provisions. In

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[2] The Board notes that the March 7, 1985 memorandum states in part:

"Compensation . . . should continue to be paid in accordance with the benefit provisions of the Korean Labor Standard Act (KLSA), not to exceed the amount of compensation payable under the FECA. The regulations governing payment of the Korean cases will be revised to reflect this practice.

"Payment under the KLSA of a burial allowance exceeding $800 is not prohibited as long as the total compensation payable for the death of the employee (including the burial payment) does not exceed the total amount of death benefits computed under sections 8133 and 8134 of the FECA. Should KLSA benefits exceed those of the FECA, 20 C.F.R. section 25.2(e) would prohibit payment in excess of the total amount payable under the FECA."

> compliance with 20 C.F.R. section 25.2(e), the amount generally payable under FECA was awarded."

By letter dated October 8, 1986 appellant appealed the July 11, 1986 decision amount of compensation awarded, and argued that the March 7, 1985 memorandum indicated that "the compensation payment has been made by the guidance provided by the higher authority, but not by the regulation, which is illegal." Appellant requested that $33,746.40 be paid under the KLSA as she was originally advised that it would be by the employing establishment civilian personnel office.

The Board finds that the Office properly determined the amount of appellant's compensation under the Federal Employees' Compensation Act, 5 U.S.C. sections 8133(a)(1), 8134(a), 8135(a)(2), and 8137. The Federal Employees' Compensation Act section 8133(a)(1) states in relevant part:

> "(a) If death results from an injury sustained in the performance of duty, the United States shall pay monthly compensation equal to a percentage of the monthly pay of the deceased employee in accordance with the following schedule:
>
> (1) To the widow or widower, if there is no child, 50 percent." [3]

Section 8137 of the Act provides for the payment of compensation to employees, and their dependents, who are neither citizens nor residents of the United States or Canada. Under subsection (a) the Office may, under certain circumstances, adopt the substantive features of a local workman's compensation system or establish a special schedule of compensation, and may modify these benefits at anytime.[4] Under subsection (b) the Office may discharge all liability of the United States with respect to a particular appellant by making a lump sum payment under 5 U.S.C. section 8135.[5] Pursuant to section 8135(a) lump sum payments to a widow of a deceased employee "may not exceed 60 months compensation." [6]

The Office, therefore, properly determined that the maximum amount of death benefits payable to appellant under the FECA was 50 percent of the employee's monthly pay of $670.50, as directed by section 8133(f), for a total lump sum payment allowable under the FECA of $21,115.00.

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[3] 5 U.S.C. section 8133(2)(1).

[4] 5 U.S.C. section 8137(2).

[5] 5 U.S.C. section 8137(b).

[6] 5 U.S.C. section 8135(a).

After determining that the amount payable to appellant under the KLSA was $33,746.40, the Office properly turned to the regulations applicable to this claim at 20 C.F.R. section 25 *et seq.*, which were promulgated pursuant to 5 U.S.C. section 8137. These regulations, at 20 C.F.R. section 25.2(e), state the following:

> "Compensation for disability and death of noncitizens outside the United States under this part, whether paid under local law or special schedule, *shall in no event exceed that generally payable under the Federal Employees' Compensation Act.*" (emphasis supplied).

The Office properly applied 20 C.F.R. section 25.2(e) and determined that the maximum amount payable to appellant was the $21,115.00 amount calculated under the Act. Since there is no provision for compensation greater than that provided for the regulations,[7] appellant is entitled to no more than the $21,115.00 she has already been awarded.

The compensation award of the Office of Workers' Compensation Programs dated July 11, 1986 is hereby affirmed.

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[7] *See Felix M. Calimbalin*, 28 ECAB 178 (1977).

In the Matter of ROGER WILCOX *and* U.S. POSTAL SERVICE, POST OFFICE, Oklahoma City, Okla.

Docket No. 87-90; Hearing July 20, 1987;
Issued November 27, 1987

Appearances: *Tom Wilcox, Esq.*, for appellant; *LuAnn B. Kressley, Esq.*, for the Director, Office of Workers' Compensation Programs.

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly suspended appellant's compensation benefits effective September 5, 1985 based on his obstruction of a medical examination; and, (2) whether the Office's denial of appellant's request for issuance of subpoenas constituted an abuse of discretion.

On January 12, 1978 appellant, then a 51-year-old rural carrier, slipped and fell in the lobby of the post office. This injury resulted in a ruptured disc at level L3-4, L4-5 and corrective surgery was performed by Dr. William A. Miller, a Board-certified orthopedic surgeon, on March 15, 1978. Appellant received appropriate compensation for periods of temporary total disability and, upon his return to work on December 17, 1979 as a distribution clerk, for wage loss resulting from the residuals of his January 12, 1978 employment injury.

Subsequent to the surgical procedure for his ruptured disc, appellant came under the regular medical management of Dr. William N. Harsha, a Board-certified orthopedic surgeon. In a March 5, 1985 report to the Office, Dr. Harsha noted that appellant's "diagnosis over the months now seems to better be described as symptomatic degenerative arthritis, generally through the dorsal and lumbar spine primarily with recurrent episodes of exacerbation."

By letter dated April 17, 1985 the Office of Workers' Compensation Programs referred appellant, his case record and a statement of accepted facts to Dr. Marvin Margo, a Board-certified orthopedic surgeon, for examination and evaluation of any employment-related disability. A copy of this letter, which included a warning on refusing to submit to such examination pursuant to section 8123(d) of the Federal Employees' Compensation Act, was also sent to appellant's attorney of record.

Dr. Margo examined appellant on June 3, 1985 and based on this examination and review of the case file and statement of accepted facts, submitted the following evaluation:

> "It is felt this patient is markedly obese. This, associated with extensive degenerative disease and osteoarthritis in his lower back. I feel that the patient recovered from his injury of January 12, 1978, and all of his symptoms now are directly related to an acquired degenerative disc disease in his back that has no direct relationship to his back injury.
>
> "There is no medical evidence to support his contention that he was disabled for work from April 10, 1984 to June 17, 1984. I think the patient is capable of performing duties as a distribution clerk for 8 hours a day. See work restriction evaluation. With the degenerative disc disease and osteoarthritis he is going to have intermittent pain and muscle spasms in his back but this is not related to his injury of 1978.
>
> "It is also noted that probably a larger factor than his injury is his marked obesity.
>
> "It is also to be noted that on the patient's x-rays he shows two screws in place in the area of his right acetabulum. This

> was not explained to me by the patient and could also be a factor in his generalized discomfort."

By letter dated June 21, 1985 the Office notified appellant's attorney that Dr. Margo's evaluation created a conflict in the medical evidence which required referral of appellant, pursuant to 5 U.S.C. section 8123, to a referee medical specialist. The letter also informed appellant's attorney of the opportunity to participate in the selection of the referee physician as appellant would receive the names of three appropriate specialists from which he could choose among or specifically object to.

By letter dated July 15, 1985 the Office informed appellant, with a copy to his attorney, of a list of three Board-certified orthopedic surgeons who had indicated a willingness to participate in medical evaluation—Drs. Henry Freede, Robert Rounsaville and John P. Livingston. The letter requested a choice by July 29, 1985 and noted the requirement of a valid reason for refusal to be examined by any of the three listed. It was added that if no response were received, appellant would be referred to the next orthopedic surgeon in rotation.

By letter dated July 22, 1985 appellant's attorney responded with the following:

> "Prior to the selection of a physician who will perform the impartial medical evaluation of Mr. Wilcox I ask that you provide me with a list of the physicians who have indicated to the Office of Workers' Compensation Programs that they would be willing to participate in impartial medical evaluations and whose business address is located in the State of Oklahoma.
>
> "Hopefully when I have received this information I will be able to respond to your request so that an impartial medical physician may be selected."

In a telephone memorandum dated July 31, 1985 the Office noted that appellant's attorney would not make any determination for selection of a referee physician until he received information on whether any of the three listed physicians had ever done second opinion evaluations for the Office and how long the three physicians had been doing impartial evaluations.

By letter dated August 2, 1985 the Office responded that Drs. Freede and Rounsaville had performed second opinion evaluations for the Office in the past but in March, 1984 requested to be used as referee specialists only. The Office then noted that appellant's attorney had indicated to them that he would not consider selecting a past second opinion doctor as a referee physician and provided appellant and his attorney with two replacement physicians for Drs. Freede and Rounsaville—Drs. Stephen Tkach and Bruce S. Hinkley. Appellant was also informed that if no selection were made by August 16, 1985 then Dr. Livingston would be chosen. It was also noted that physicians performing impartial medical examinations were selected by systematic rotation through the Directory of Medical Specialists and that doctors performing such do not sign contracts with the Department of Labor so as not to violate strict impartiality.

By letter dated August 14, 1985 appellant, through counsel, sought to disqualify Dr. Tkach from the list because of his status as an associate of Dr. Margo and requested an extension of the time for selecting a referee physician on the following basis:

> "There appear to be some inconsistencies between our conversation on July 31, 1985 and your letter dated August 2, 1985. During our telephone conversation I was informed that there were only four (4) physicians that had indicated they would be willing to do the impartial evaluation. However, in your letter dated August 2, 1985, you have indicated that the physicians performing referee or impartial medical examinations are selected by systematic rotation through the Directory of Medical Specialists. In addition you failed to list the doctor in Antlers, Oklahoma that performs the impartial medical examinations.
>
> "Please provide me with the specific directory that you obtain these doctors from. I feel it is necessary to clarify this inconsistency so that we may proceed with our selection."

By letter dated August 27, 1985 the Office referred appellant, his case record, and statement of accepted facts to Dr. Livingston for examination and evaluation. This letter informed appellant of a September 4, 1985 appointment made for him with Dr. Livingston and of the need to reconfirm this appointment with the doctor. The letter also warned appellant of the provisions of section 8123(d) for refusing to submit to such examination.

In a telephone memorandum of a conversation with appellant's counsel dated September 3, 1985, it was noted that appellant complained of "inconsistencies" in the referee physician selection process and that Dr. Livingston was selected as the impartial specialist because counsel had raised no objections to his name in particular. It was also reported that counsel had been warned that failure to appear at the scheduled appointment would be considered an obstruction.

By letter dated September 4, 1985, received by appellant's attorney September 7, 1985, the Office warned appellant and the attorney of the consequences of refusal to submit to the examination by Dr. Livingston without valid reason and suggested that appellant reschedule his appointment at the earliest possible time if he missed his original appointment. Further, the following description of the referee selection process was provided:

> "Some time ago, our Medical Director contacted all Board-certified physicians listed in the AMA Directory to see whether they would examine claimants on a second opinion or referee basis. Those who wished to work on a second opinion basis were required to sign contracts. Those who preferred to perform referee examinations were not required to sign contracts. Any physician who performs an examination, whether on a second opinion basis or as a referee is considered impartial if the physician has not previously examined the claimant. In the state of Oklahoma only 14 physicians indicated willingness to perform referee examinations. Of these only two were orthopedists. Later, two of the second opinion physicians opted to terminate their contracts to perform such examinations, but indicated they would be willing in the future to perform referee examinations, as was the case with Dr. Freede. Thus, for a variety of reasons, the list is not static and is subject to change. Also, if we find that after calling the physicians on the list they are not willing or able to participate, we will go down the list in the AMA directory and contact others until we find one who is willing to perform such an examination. In the instance of the examination scheduled for Mr. Wilcox, we found that Dr. Shore of Antlers was no longer willing to perform examinations for the Department of Labor. As we went down the list in the directory, we found that others listed were either now retired or were not willing to perform an examination. We selected the first ones we came to which were willing and were qualified. The particular directory we are currently using is 1983–84.
>
> "In order to save you the time and bother of requesting our list of referee physicians for orthopedic examinations, I am herewith providing you the only names currently listed: Dr. Robert Rounsaville and Dr. Henry Freede. Dr. Livingston and Dr. Tkach were selected from the directory.

> "I hope the above explains to your satisfaction the selection process. As I advised you on the telephone, we consider that our selection was reasonably and fairly made, that we have allowed participation in the selection process."

As indicated in a telephone memorandum of a conversation with Dr. Livingston's office dated September 5, 1985, appellant did not appear for his appointment on September 4, 1985 nor did he telephone to cancel or reschedule.

By letter dated September 6, 1985 appellant's attorney set forth some of the "reasons/difficulties" he had with the Office's selection of Dr. Livingston, including the fact that: (1) Appellant's attorney did not receive notice of the doctor's appointment; (2) Shortness of notification conflicting with the doctor appointments; (3) Not receiving a copy of the statement of accepted facts, medical history, etc., and not having sufficient time to respond to materials sent to the doctor; (4) Not having sufficient time to submit supplemental material to the doctor; (5) Failure to allow him to meaningfully participate in the selection; (6) The Office's failure to respond to his July 15, 1985 and August 14, 1985 letters prior to the setting of the appointment; (7) Failure to select an impartial physician, not allowing attorney's participation in the selection and direct misrepresentation by an Office of Workers' Compensation Programs employee in a telephone conversation of July 31, 1985. Appellant's attorney also noted that he felt that the law provided that the selection of an impartial physician was to be determined in a nonrestrictive manner, and he concluded by noting that had he received adequate responses to his inquiries which were necessary to allow such unrestricted and meaningful participation, then no such difficulties would have arisen. Accordingly, he indicated that appellant was not, therefore, in obstruction of his claim by missing his appointment prior to the resolution of appellant's reasonable inquiries.

By compensation order dated October 2, 1985 the Office suspended appellant's compensation effective September 4, 1985 due to his refusal to submit to a medical examination in accordance with section 8123 of the Federal Employees' Compensation Act. In an attached memorandum, the Office stated that notification of a medical appointment to appellant's attorney was a matter of courtesy only and that failure to so notify was an insufficient reason for appellant to miss his appointment. Further, since appellant was instructed to reschedule if necessary, the fact that he had a prior commitment at the appointed time was insufficient to excuse his failure to reschedule. In addition, the lack of time for appellant to submit supplemental information to Dr. Livingston or comment on the statement of accepted facts was likewise insufficient justification for failing to reschedule. The Office then concluded that it had answered appellant's inquiries satisfactorily, that appellant had been given meaningful participation in the selection of an impartial specialist to the extent required, and that appellant had yet to provide valid reasons why Dr. Livingston, in particular, should be disqualified.

By letter dated October 16, 1985 appellant requested a hearing before an Office hearing representative which was scheduled for February 26, 1986.

In a letter to the Office hearing representative dated February 10, 1986 appellánt, through counsel, requested issuance of subpoenas to a number of Office employees and the production of related Office documents. Among the employees for whom subpoenas were requested were those employees who had corresponded with or telephoned appellant and his counsel and those unnamed employees who were responsible for updating the Oklahoma district list of orthopedic surgeons who perform either second opinion examinations or impartial examinations for the Department of Labor. Among those documents requested were a list of orthopedic specialists who had performed or been listed to perform referee examinations and second opinion examinations for the Dallas Office of Workers' Compensation Programs in the Oklahoma district during the last five years. Appellant also indicated a willingness to transfer the hearing location to Dallas to facilitate production of the subpoenaed employees and documents and stated that failure to produce them would be prejudicial to this case as the employees and documents were critical to his evidence.

By letter dated February 19, 1986 the Office hearing representative denied appellant's requests on the ground that compelling attendance of the persons requested or production of the documents would serve no useful or relevant purpose on the only issue of obstruction.

Appellant's hearing was held on February 26, 1986 as scheduled. At the hearing, appellant, through counsel, acknowledged the necessity of an impartial examination and indicated that appellant would willingly undergo such upon resolution of appellant's inquiries into the referee physician selection process as appellant had willingly submitted to examination by Dr. Margo—the second opinion physician who created the conflict to be resolved. Appellant's attorney also stated that he believed that the Office intentionally failed to send him notice of the September 4, 1985 impartial examination as copies of all other correspondence to appellant were otherwise sent to him.

Further, appellant, through counsel, objected to the selection of Dr. Livingston because his name was allegedly on a preferential list for selection and was not, therefore, put forth as a choice as a result of a systematic rotation process as suggested by the Office and as required by procedures. Accordingly, appellant, through counsel, contended that Dr. Livingston was not "impartial" as he was part of a prejudiced and preferred panel of choices, and therefore, appellant was not unreasonable in foregoing his appointment with Dr. Livingston pending resolution of appellant's inquiries into the referee physician selection process. Appellant's attorney also indicated that this explained the failure of the Office to provide him with adequate or consistent answers to his inquiries regarding the referee physician selection process. Appellant then acknowledged that he made no specific objection to Dr. Livingston while he was awaiting responses to his inquiries, and he noted further that he had not yet thought about objecting to Dr. Livingston in particular with regards to his qualifications to otherwise perform the medical examination and evaluation. Appellant's attorney then made an offer of proof as to the testimony of the requested witnesses had they been subpoenaed to establish that they would have testified on cross examination that a preferred list was maintained and that therefore, the Office did not follow the established procedures in selecting an impartial physician through systematic rotation. Appellant also testified that he did not receive the August 27, 1985 letter informing him of his September 4, 1985 appointment with Dr. Livingston until September 3, 1985, that he had a conflicting prior commitment to be at a separate, nonemployment-related medical appointment on September 4, 1985 and that he did not call to reschedule. Appellant's attorney then concluded that under the circumstances outlined above, appellant's refusal for additional examination was reasonable and in good faith.

By decision dated July 9, 1986 and finalized on July 14, 1986 the Office hearing representative affirmed the October 2, 1985 decision which suspended appellant's compensation effective September 4, 1985 because of appellant's obstruction of a medical examination. The hearing representative also formalized his prior decision to deny appellant's request for subpoenas to compel the appearance of Office employees at the hearing.

The Board finds that the Office of Workers' Compensation Programs improperly suspended appellant's compensation benefits effective September 5, 1985 based on his alleged obstruction of a medical examination.

Section 8123(a) of the Federal Employees' Compensation Act authorizes the Office to require an employee who claims compensation for an employment injury to undergo such physical examinations as it deems necessary. Section 8123(d) provides further that "If an employee refuses to submit to or obstructs an examination, his right to compensation under this subchapter is suspended until the refusal or obstruction stops." Before the Office may invoke this provision, however, the Federal (FECA) Procedure Manual provides that an appellant must be given an opportunity to present, in writing, his or her reasons for the refusal or obstruction.[1] This necessarily envisions consideration of these reasons before the Office exercises its discretion to invoke the obstruction provision.

In this case, the Office properly considered appellant's September 6, 1985 letter outlining his "reasons/difficulties" with the selection of Dr. Livingston as the impartial specialist and correctly found them to be insufficient objections against Dr. Livingston in particular.[2] However, the Office failed to exercise its discretion and consider appellant's reasons for actually failing to appear at the scheduled examination. Appellant has noted that he did not receive notice of the examination until the day before the September 4, 1986 examination, that this examination conflicted with a previously scheduled and longstanding appointment, and that the scheduled examination was set for a site that was over 100 miles away. Under these combined set of circumstances, appellant's failure to appear or immediately reschedule his appointment does not necessarily appear unreasonable or irresponsible. The Office noted in its October 2, 1985 decision that the fact that appellant had a prior appointment was insufficient to excuse his failure to reschedule, but they did not address this matter in the total context of appellant's circumstances at the time, particularly given the very short period of notice. Accordingly, as the Office did not properly exercise its discretion and consider the reasonableness of appellant's explanation for failing to appear under the particular circumstances of his case, the Office did not meet its burden to show that appellant obstructed his examination.

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[1] Federal (FECA) Procedure Manual, Chapter 3-400, paragraph 1.

[2] The Federal (FECA) Procedure Manual provides at Chapter 3-400, paragraph 3a that upon specific request, appellant be provided with a list of three or more impartial specialists to allow a degree of participation in selection process; this was provided to appellant in this case. Thereafter, an appellant must give specific, definitive reasons as to why the selected physician should not have been chosen. Vague or general reasons such as the objections made in this case will not be acceptable.

The Board finds further that the Office did not abuse its discretion by denying appellant's request for subpoenas.

Section 8126 of the Federal Employees' Compensation Act states, "The Secretary of Labor, or any matter within his jurisdiction under this subchapter, may (1) issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles . . ." As the Board has stated, this section of the Act gives the Office the discretion to grant or reject requests for subpoenas.[3] Accordingly, the function of the Board on this appeal is to determine whether there has been an abuse of discretion.

In this case, appellant has contended that the subpoenas were necessary to establish that an improper selection process was used to produce Dr. Livingston as the impartial specialist in this case. As noted above, however, the Office had noted correctly that these types of objections were insufficient objections against the medical qualifications of Dr. Livingston in particular to perform the impartial examination. Therefore, the Office has reasonably exercised its judgment in refusing to issue the subpoenas that appellant claims was necessary to support his objections to Dr. Livingston as such evidence would not have gone to Dr. Livingston's particular medical qualifications to perform the examination. The Board notes that appellant knew as early as August 2, 1986 that Dr. Livingston would be the selected impartial specialist and raised no other relevant objections to his medical qualifications in particular.

The decision of the Office of Workers' Compensation Programs dated July 9, 1986 and finalized on July 14, 1986 is affirmed insofar as it finds that the Office did not abuse its discretion by not issuing the subpoenas requested by appellant and reversed insofar as it finds that the Office properly suspended appellant's compensation benefits based on his alleged obstruction of a medical examination.

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[3] *George Lanzy*, 35 ECAB 746 (1984).

In the Matter of WILLIAM A. GIOVANONI *and* VETERANS ADMINISTRATION, VETERANS ADMINISTRATION HOSPITAL, Bronx, N.Y.

Docket No. 87-1575; Submitted on the Record;
Issued November 30, 1987

ORDER DISMISSING APPEAL

Before MICHAEL J. WALSH, GEORGE E. RIVERS, DAVID S. GERSON

On July 6, 1987 appellant filed an application for review from letters of the Office of Workers' Compensation Programs, dated November 10, 1986 and March 4, 1987, addressed to Senator Daniel P. Moynihan which advised the Senator of the status of appellant's claim before the Office.

On October 5, 1987 the Director of the Office filed a motion to dismiss the appeal. The Director noted that by compensation order dated October 23, 1981, the Office had denied review of an April 24, 1980 Office decision on the ground that appellant's application for review was *prima facie* insufficient to warrant review under 5 U.S.C. section 8128(a). The Director indicated that the most recent formal decision by the Office of appellant's claim was the October 23, 1981 compensation order and that the letters addressed to Senator Moynihan were not final decisions of the Office. The Director requested that the appeal be dismissed and indicated that upon return of the case record to the Office, the evidence submitted by appellant through his Senator would be considered and a final decision would be issued under 5 U.S.C. section 8128(a) after allowing appellant the opportunity to submit any additional evidence.

Appellant was served with a copy of the Director's motion. By letter dated November 3, 1987, received by the Board on November 9, 1987, appellant objected to the Director's motion contending that the letters to Senator Moynihan represented formal decisions by the Office with respect to his claim.

The Board has duly considered the matter. Section 8124(a) of the Federal Employees' Compensation Act provides that the Office shall determine and make findings of fact "and make an award for or against payment of compensation" after considering the claim presented by the employee and after completing such investigation as the Office considers necessary with respect to the claim.[1] The Office has promulgated regulations which provide guidance for the issuance of final agency decisions. Section 10.130 of Part 20 of the Code of Federal Regulations provides in pertinent part that the final decision of the Office "shall contain findings of fact and a statement of reasons. A copy of the decision, together with information as to the right to a hearing, to a review, and to an appeal to the Employees' Compensation Appeals Board, shall be mailed to the claimant." [2] The Office's Federal (FECA) Procedure Manual further provides that the disallowance or formal denial of benefits under the Act is by a compensation order or letter of denial which must inlcude findings of fact and provide the reasons for the denial in sufficient detail so that the claimant will understand the reasoning behind the rejection of the claim and will be able to make an informed decision as to what further action on the claim should be made.[3] Finally, the Board's *Rules of Procedure* at 20 C.F.R. section 501.2(c) provide that there shall be no appeal with respect to any interlocutory matter disposed of by the Office during the pendency of a case.[4] The Board's jurisdiction is limited by regulations "to consider and decide appeals from the final decision of the Office in any case arising under the Act."[5]

In the present case, there is no final decision of the Office from which an appeal can be entertained. The November 10, 1986 and March 4, 1987 letters by the Office to Senator Moynihan represent an interlocutory action taken by the Office, i.e., advising appellant's Senator of the status of appellant's claim, and do not constitute final decisions of the Office with respect to appellant's claim for benefits under the Act. For this reason, the Board does not have jurisdiction over this appeal under 20 C.F.R. section 501.2(c).

IT IS THEREFORE ORDERED that the appeal docketed as No. 87-1575 be dismissed and the case record returned to the Office of Workers' Compensation Programs.

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[1] 5 U.S.C. section 8124(a).

[2] 20 C.F.R. section 10.130.

[3] Federal (FECA) Procedure Manual Chapter 2-1400, Disallowances (August 1985).

[4] 20 C.F.R. section 501.2(c).

[5] *Id. See James D. Boller*, 12 ECAB 45 (1960); *James D. Hammond*, 32 ECAB 1781 (1981); *Ernesto L. Montoya*, 35 ECAB 205 (1983).

In the Matter of RICHARD MICHAEL LANDRY *and* U.S. POSTAL SERVICE, POST OFFICE, Springfield, Mass.

Docket No. 87-207; Hearing November 10, 1987;
Issued November 30, 1987

Appearances: *George F. Kelly, Esq.*, for appellant; *Catherine P. Carter, Esq.*, for the Director, Office of Workers' Compensation Programs.

Before DAVID S. GERSON, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether appellant's injury on September 21, 1985 was sustained in the performance of duty.

On September 22, 1985 appellant, then a 34-year-old mail processing mechanic, filed a claim alleging injury to his skull and multiple fractures sustained when he was thrown from the bed of a truck on September 21, 1985. Appellant was employed at the Springfield Bulk Mail Center and had been assigned to temporary duty at the employing establishment National Training Center in Norman, Oklahoma, for the period August 26, 1985 to September 27, 1985. Appellant was assigned to the training program at the same time as two co-employees from the Springfield Bulk Mail Center, Vincent T. Haggerty, age 23, and Donald A. Scibelli, age 24.

The events surrounding appellant's injury on September 21, 1985 were described by Donald Scibelli on September 23, 1985, as follows:

> "Vince Haggerty, Richard Landry and myself (Donald Scibelli) left Couch Towers to go out for a few beers and maybe see a local band and check out the night life. We eventually arrived at a local nightclub called Gizmos. We stayed there for a couple of hours and had a good time listening to the band. We left at about 1:30 a.m. on our way to 'Lil Darlings.' We were not too sure how to get there and ended up getting lost. While we were walking around trying to spot some familiar landmarks we tried hitching a ride, to no avail. After walking around five to six miles we found Lindsey Street. We walked up Lindsey Street looking for a place where we could get some breakfast. While walking up Lindsey Street we crossed paths with this guy wearing a cowboy hat and Richard said some-

thing like: 'Howdy Partner, where could we get something to eat?' So the guy points to a Taco Bell so we start walking over there. We engaged in some light conversation and the guy said he just left a party. As soon as we started walking into the Taco Bell parking lot we heard some screeching tires so we turned around and here came a truck and he went around us and came to an abrupt halt in front of the Taco Bell. We started to go in but the door was locked so Richard and Vince convinced the driver to take us to somewhere where we could get breakfast. On the way over there me and Vince were sitting down in the bed of the truck and Rich was with the driver in the cab. We eventually ended up at the Kettle on Lindsey Street but the driver took a round about route in getting there. He drove fairly erratic on the way over there; for example, squealing tires around corners and sudden stops and starts at stop signs. I was becoming concerned but it seemed he knew what he was doing.

"We arrived at the Kettle and ate breakfast along with about four cups of coffee each. While at the Kettle, the driver agreed to take us back to Couch Towers. Vinney talked about how nice it was in the back of the truck so when we left, Vinney and Richard jumped in the bed and I sat in the cab. The driver said that he would go the back way to Couch Towers so Vinney and Richard could get a good ride. The driver's famous last words were something in the effect of 'I'll take you guys for a good ride.'

"He proceeded down Chautauqua Avenue at about 85 miles per hour because I looked at the speedometer from an angle and saw the bottom of the needle facing to the left so the pointer was to the right. I figured the speedometer went up to 85 so the needle pointing almost perfectly horizontal to the right had to be about 85. He eventually slowed down for a stop sign and proceeded straight. We were getting towards the end of the street and I would estimate about 60 miles per hour when we saw the road turn 90 degrees to the left and I knew we wouldn't make it. The truck swerved to the right off the road and we just missed a telephone pole to our right and we were bouncing all over the place plowing down the brush. We finally stopped and we were on the road again. We asked each other if we were okay and then we noticed Vince and Richard had been bounced out of the truck. I ran back up the road screaming their names but there was no answer, all I could hear was very faint moaning. I ran towards the metal gate and

> found them both laying there right up against it. Evidently the gate had stopped them from rolling. I tried to revive them but I couldn't. I checked both for heartbeat and breathing and they both had heartbeats and were breathing. Right about now a car was coming down the road with high beams on and I waved him over and it was a Norman police officer. He quickly called for an ambulance and while waiting we tried to revive Vince and Richard. Vince appeared to go into shock, so I raised his legs and Richard was moaning and trying to move his left arm. The ambulance arrived [in] about 10 to 15 minutes and the paramedics took over."

Appellant and Vincent Haggerty were transported to local hospitals. Appellant was diagnosed as having sustained a basilar skull fracture with closed head injury; fractures of the right forearm and left clavicle; and multiple contusions and lacerations of the left leg and ear. Vincent Haggerty was pronounced dead at 7:05 a.m. due to a skull fracture and multiple traumatic injuries.

By letter dated October 10, 1985 the Office of Workers' Compensation Programs requested the employing establishment to submit further information concerning the time and location of appellant's injury. On October 15, 1985 the employing establishment noted that appellant last performed official duty on September 20, 1985 at 4:45 p.m. in his status of temporary duty at the Technical Training Center in Norman, Oklahoma. It was noted that the employee was traveling between the Kettle Restaurant and the Couch Center South Tower at the time of injury to return to his place of lodging after eating breakfast and that appellant's next official duty did not commence until 8:00 a.m. on September 23, 1985. The employing establishment noted that appellant was not on the most direct route between his last official duty and the point of his next expected duty and that expenses for such travel were not reimbursable.

By letter dated October 17, 1985 the Office requested the employing establishment to submit further information regarding any restriction or code of conduct provided employees on temporary duty assignments and whether the activities of appellant were within the scope of his agency's standards for temporary duty. The employing establishment responded on October 28, 1985 noting that there were no rules issued or curfews imposed at the Oklahoma training facility regarding employees in a training status. It was noted, however, that the only code of conduct information provided to postal service employees was information included in the Employee and Labor Relations Manual, a copy of which was submitted to the Office.

By memorandum dated December 3, 1985 an Office claims examiner noted that she had spoken by telephone with the Training Center in Norman and was informed that employees were housed on facilities located on the campus of the University of Oklahoma, that the campus had recreational facilities and events sponsored by recreational coordinators, that various pubs were located around the area of campus, that the accident occurred outside Norman (five or more miles), and that employees were not restricted as to outside activities.

In a December 27, 1985 compensation order the Office rejected appellant's claim finding that the activities engaged in by appellant were not reasonably incidental to the performance of the special assignment at the Training Center and, therefore, appellant was not in the performance of duty when injured on September 21, 1985. In an accompanying memorandum the Office stated that while appellant was expected to stay in government furnished housing in dorms at the training facility, he had voluntarily deviated from activities incidental to the performance of his special assignment.

By letter dated January 14, 1986 appellant, through his representative, requested a hearing before an Office hearing representative which was held on May 20, 1986. At the hearing Donald Scibelli appeared and testified that he stayed at Couch Towers with appellant and Vincent Haggerty while attending an employing establishment training program. He stated that at 9:00 p.m. on Friday, September 20, 1985 the three employees left the dorm to eat at Gizmo, a local restaurant, located about two miles from the dorm. He indicated that the three men stopped at a nearby bar for a beer before dining at the restaurant. They left Gizmo's at 1:30 a.m. and walked around trying to find another nightclub before closing at 2:00 a.m. He recounted meeting Danny Brashear, the driver of the truck and the details of the accident. In answer to a question by the hearing representative, Scibelli noted that there was taxi service available in Norman, but that it had not crossed his mind to call a taxi for transportation back to the dorm from the Kettle Restaurant. Appellant also appeared and testified that it was common for students to walk around the university and nearby vicinity in Norman and noted that he did not use taxi service because he did not have the money for it. Appellant indicated that he had no independent memory of the accident or the events of the evening prior to his injury.

Following the hearing, appellant submitted the affidavit of Patrick W. Adams, a police officer for the City of Norman, Oklahoma, who stated that at approximately 4:10 a.m. he investigated an accident at the corner of Chautauqua and Bratcher-Miner Road. He administered a breathanalyzer test to the driver of the vehicle, Danny Merle Brashear, and the results were recorded at .04 blood/alcohol level. Officer Adams noted that because this result was within the legal limit for blood/alcohol, Mr. Brashear was not cited for any alcohol-related offense. He was, however, cited for negligent homicide.

In a decision dated July 31, 1986 and finalized August 1, 1986 the Office hearing representative affirmed the December 27, 1985 Office decision which rejected appellant's claim.

The Board finds that appellant's injury of September 21, 1985 was not sustained while in the performance of duty.

Larson, in his treatise on *Workman's Compensation Law*, sets forth the general criteria for performance of duty as it relates to traveling employees or employees on temporary duty assignments, as follows:

> "Employees whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown. Thus injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable." [1]

Similarly, the Board has recognized the rule that the Federal Employees' Compensation Act covers an employee 24 hours a day when he or she is on travel status or on a temporary duty assignment or a special mission and engaged in activities essential or incidental to such duties.[2] However, when the employee deviates from the normal incidents of his or her trip and engages in activities, personal or otherwise, which are not reasonably incidental to the duties of the temporary assignment contemplated by the employer, the employee ceases to be under the protection of the Act and any injury occurring during these deviations is not compensable.[3]

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[1] A. Larson, *Workman's Compensation Law*, section 25.00 at 5-200 (1982).

[2] *See Lydia Muse Shields (John Marcellus Shields)*, 2 ECAB 162 (1949); *William K. O'Connor*, 4 ECAB 21 (1950); *Garrett M. Levie*, 6 ECAB 94 (1953); *George W. Stark*, 7 ECAB 275 (1954); *Frances A. Taylor*, 8 ECAB 449 (1955); *Miss Leo Ingram*, 9 ECAB 796 (1958); *Conchita A. Elefano (Domingo P. Elefano)*, 15 ECAB 373 (1964); *Ethyl L. Evans*, 17 ECAB 346 (1966); *Karl Kuykendall*, 31 ECAB 163 (1979); *Mattie A. Watson (William W. Watson)*, 31 ECAB 183 (1979); *Melvin E. Koon*, 32 ECAB 258 (1980); *Stanley T. Takahaski*, 35 ECAB 1065 (1984); *Janice K. Matsumura*, 36 ECAB 262 (1986).

In *Lydia Muse Shields (John Marcellus Shields)*,[4] the deceased employee was on a temporary duty assignment to New York City. The whereabouts of the employee were unaccounted during the hours of 8:00 p.m. to 3:00 a.m. on the morning of February 27, 1947 when the employee was seen alighting from a cab and starting to walk towards the hotel entrance where he was residing. The decedent stiffened and fell to the ground sustaining a blow to his head. The Board found that the employee's fatal injury was not sustained in the performance of duty based on the record as assembled as there was no indication for the appellant's return to the hotel at the late hour and there was no evidence to infer that the deceased came to his death during the course of some ordinary incident of his mission.[5]

In *William K. O'Conner*,[6] the employee sustained injury when he was struck by an automobile while crossing a street in Pittsburgh while en route from his place of employment to the hotel he was residing while on temporary assignment in that city. The Board found that appellant sustained injury while in the performance of duty as his travel to the hotel after having dinner in a local restaurant was within the normal incident of his employment and was such a trip which would be contemplated by the employer while the employee was on temporary duty.

In *Garrett M. Levie*,[7] the employee was on temporary duty to Pittsburgh and sustained injury, after his regular scheduled duty hours, in an automobile accident while driving to New York City with several coemployees. The Board found that the employee's injury was not sustained in the performance of duty as he had deviated from the normal activities reasonably incidental to his employment for purposes that were purely personal and recreational in nature.[8]

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[3] *See* note 2.

[4] 2 ECAB 162 (1949).

[5] *Cf. Theresa B. L. Grissom (Thomas H. Grissom)* 18 ECAB 193 (1966) in which the Board found that the decedent employee's fatal injury was sustained in the performance of duty. The whereabouts of the employee were unaccounted during the hours of 9:00 p.m. to 11:00 p.m. on the night of May 11, 1965 when the employee was last seen walking toward the parking lot of the hotel where he was residing. The fatal accident occurred when the employee drove from the parking lot of the Forrest Cocktail Lounge onto Highway U.S. 90 and was involved in a motor vehicle accident. Without discussion, the Board in that case noted that it was the Office's burden of proof to show that a significant deviation from the scope of employment had occurred.

[6] 4 ECAB 21 (1950).

[7] 6 ECAB 94 (1953).

[8] The Board noted that the question of whether a deviation has occurred which would preclude an employee's recovery under the Act is a question of fact to be determined from the circumstances of each case.

In *Conchita A. Elfano (Domingo P. Elefano)*,[9] the deceased employee was on a temporary duty assignment to the Subic Bay Naval Base. The employee left the base at 11:30 p.m. with a companion and went to a nearby night club in Olongapo City where they remained until 4:00 a.m. The employee sustained a fatal injury when he was struck by a bullet while riding as a passenger in a cab back to the naval base. The Board found that the employee's fatal injury was not sustained in the performance of duty as he had deviated from the normal activities incidental to his employment for purposes that were personal and diversionary in nature.

In *Karl Kuykendall*,[10] the employee was on temporary duty for training in Denver and sustained injury, after his regular scheduled duty hours, when he fell from a ski lift at Loveland Pass, Colorado, approximately 60 miles west of Denver. The Board found that the employee's injury was not sustained while in the performance of duty as he had deviated from activities reasonably incidental to his temporary duty assignment to engage in recreational activities. Similarly, in *Mattie A. Watson (William W. Watson)*,[11] the Board found that a deceased employee on temporary duty to Pearl Harbor, Hawaii, was not killed while in the performance of duty when a boat he had chartered capsized and the employee drowned. The Board held that the boat trip was not related to activities incidental to the employee's temporary duty assignment and he had engaged in personal and recreational activities which took his actions outside coverage under the Act.

The facts in the present case establish that appellant was on a temporary duty assignment and sent by the employing establishment to the National Training Center in Norman, Oklahoma for courses related to his job as a mechanic. Appellant last performed official duty on Friday, September 30, 1985 at 4:45 p.m. and was not scheduled to perform any duty until Monday, September 23, 1985 at 8:00 a.m. In this case appellant was injured when he was ejected from the bed of a pick up truck at approximately 4:00 a.m. on Saturday, September 21, 1985. At the time of his injury, appellant was not engaged in activities reasonably incidental to his temporary duty assignment but had deviated for purposes which were personal and recreational in nature. Under the facts of the case, appellant engaged in a voluntary deviation to the adjoining local community from his temporary duty station which was not made pursuant to an activity directed by his employer nor arising out of the necessity of his employment. Appellant was therefore not in the performance of duty when he sustained injury on September 21, 1985.

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[9] 15 ECAB 373 (1964).

[10] 31 ECAB 163 (1979).

[11] 31 ECAB 183 (1979).

The July 31, 1986 decision of the Office of Workers' Compensation Programs, finalized August 1, 1986, is affirmed.

In the Matter of NEIL PAPKIN *and* U.S. POSTAL SERVICE, POST OFFICE, Miami, Fla.

Docket No. 87-581; Submitted on the Record;
Issued November 30, 1987

Before GEORGE E. RIVERS, DAVID S. GERSON, MICHELE VON KELSCH

The issue is whether appellant has more than a 14 percent permanent impairment of the right lower extremity for which he received a schedule award.

On December 17, 1981 appellant, then a 31-year-old letter carrier, filed a claim alleging he sustained injury that date to his left knee and twisted his right ankle when he fell on a driveway while in the performance of duty. Appellant stopped work and received continuation of pay for the period December 18, 1981 to January 31, 1982 and compensation for temporary total disability commencing February 1, 1982.

Appellant was treated following his injury on December 23, 1981 by Dr. Anthony T. Schiuma, a Board-certified orthopedic surgeon, who diagnosed a severe strain of the right ankle and applied a splint. On further treatment, Dr. Schiuma diagnosed a torn ligament of the right ankle and on January 27, 1982 appellant underwent surgery for arthroplasty of the right ankle and repair of the fibulo-collateral ligament. Following his recovery from surgery, appellant was returned to light duty work for four hours a day on May 17, 1982.

Appellant continued to complain of pain in his right ankle. He stopped work on December 14, 1982 and was referred by Dr. Schiuma for consultation with Dr. Manuel Porth, a Board-certified orthopedic surgeon. Dr. Porth reported on January 11, 1983 that x-rays of the right ankle revealed degenerative changes of the right ankle joint with an area of osteochondritis involving the lateral dome of the talus with subchondral bone involvement. Dr. Porth also noted cystic changes of the talus which raised the possibility of early avascular necrosis of the talus. Appellant was hospitalized on January 26, 1983 for diagnostic testing of his right ankle condition but, due to a mild allergic reaction to medication used for arthrographic study, the testing was not completed.

Appellant was returned to light duty work for four hours a day on March 14, 1983 with no walking or standing. He was again treated by Dr. Schiuma and found totally disabled for work on April 13, 1983. In an April 20, 1983 report Dr. Schiuma noted that appellant weighed 239 pounds and was overweight for his height. He recommended weight reduction and noted that appellant's condition in the future consisted of increasing traumatic arthritis of the right ankle and increasing destruction of the talus secondary to avascular necrosis which could necessitate a total ankle prosthesis or ankle fusion surgery. He indicated that appellant had a 40 percent permanent impairment of the right foot and ankle based on persistent pain, limitation of motion and avascular necrosis of the talus.

The record indicates that appellant returned to work on April 25, 1983 on part-time light duty under restrictions imposed by Dr. Schiuma and worked through June 6, 1983, when the physician indicated that appellant stop work to allow for further evaluation by x-ray of his avascular necrosis after six months.

On June 9, 1983 an Office medical adviser reviewed the record and recommended that appellant be referred for a second opinion evaluation.[1]

Appellant was referred, together with the case record and a statement of accepted facts, to Dr. David S. Teperson, a Board-certified orthopedic surgeon. By report dated August 5, 1983 Dr. Teperson noted that x-rays of the right ankle revealed some degenerative changes and osteophytes forming at the neck of the talus or the anterior head and posteriorly. The joint space was reported intact with diminished radiolucency in the head of the talus. He recommended that avascular necrosis be ruled out by further diagnostic testing. In a progress report dated August 12, 1983 Dr. Teperson noted that studies were performed on appellant's ankle which revealed internal structural changes and very great signs of aseptic necrosis, which was reported early with no collapse. Dr. Teperson recommended appellant be placed on crutches for four to six months and be placed on a rigid diet. He recommended against operative intervention at this time.

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[1] The Board notes that the Office referred to Dr. Teperson as an impartial medical specialist; however, there was no conflict in medical opinion at the time of the referral.

By letter dated January 10, 1984 the Office requested Dr. Porth to complete an OWCP-5 work restriction evaluation and indicate whether appellant could return to work. On January 28, 1984 Dr. Porth noted that appellant would return to work on light sedentary duty under specified restrictions. The record indicates that appellant returned to work on January 23, 1984. He retired on a civil service disability retirement effective July 23, 1984.

By letter dated January 10, 1984 appellant notified the Office that appellant had obtained a recovery of $80,000 in a third party lawsuit brought for his December 17, 1981 injury. Appellant was advised on January 30, 1984 that the Office had a credit in the amount of $6,473.25 against future compensation payments by the Office.

By report dated February 1, 1984 Dr. Porth reported that appellant continued to experience pain and swelling of the ankle and had some difficulty with weight bearing on the joint. He estimated that appellant had a 40 percent permanent impairment of the right lower extremity based on continued pain, swelling and limitation of motion. By letter dated May 29, 1984 the Office requested Dr. Porth to provide specific measurements with regard to the range of motion of appellant's right ankle and to indicate whether there was any atrophy. In a reply dated June 6, 1984 Dr. Porth stated:

> "Specifically, in answer to the question that you posed in your recent letter, the measurements of dorsiflexion, plantarflexion, eversion and inversion of the ankle are as follows: the right injured ankle demonstrates dorsiflexion of 12 to 14 degrees as compared to 25 degrees on the left. The right injured ankle demonstrates plantar flexion of . . . 40 degrees as compared to 55 to 60 degrees on the left. The right injured demonstrates 20 degrees of inversion as compared to 30 [degrees] on the left and the right injured ankle demonstrates 25 degrees of eversion as compared to 25 [degrees] on the left. There is no significant atrophy at this time, but there continues to be swelling in the region of the ankle on weightbearing."

On June 20, 1984 an Office medical adviser reviewed Dr. Porth's June 6, 1984 report and, applying the A.M.A. *Guides to the Evaluation of Permanent Impairment*, determined that appellant had a 14 percent permanent impairment of the right lower extremity. In arriving at his conclusion, the medical adviser noted that 14 degrees of retained dorsiflexion resulted in two percent impairment of the lower extremity; that 40 percent retained plantar-flexion resulted in no impairment of the lower extremity; that 25 degrees retained eversion resulted in no impairment of the lower extremity; and that 20 degrees retained inversion resulted in two percent impairment of the lower extremity. The medical adviser allowed ten percent impairment of the lower extremity for "discomfort or pain of the post tibial nerve" and added this value to the four percent range of motion percentage loss for a total of 14 percent impairment of the right lower extremity.

By letter dated August 14, 1984 the Office advised Dr. Porth of the medical adviser's estimate of permanent impairment to appellant's right lower extremity and requested whether there were any factors the Office had failed to consider in arriving at its estimate. By report dated August 20, 1984 Dr. Porth noted that he disagreed with the Office's estimate, stating:

> "On utilizing the A.M.A. Guides, there is no mention anywhere in that guide system of future post-traumatic degenerative arthritic changes that will definitely develop in this patient's joint. I point out to you that this has to be considered in this individual when determining a disability rating . . ."

On October 1, 1984 Dr. Harry L. Collins, an Office medical consultant in orthopedic surgery, reviewed Dr. Porth's report and stated:

> "Against giving disability for degenerative arthritis, presently existing, is the probability that some or all of it preexisted the injury of December 17, 1981. Dr. Schiuma in his first report [of] December 23, 1981 (five days after injury) stated, 'X-rays: right ankle-reveal the patient has what appears to be an old avulsion fracture off the medial malleolus. There are some mild degenerative changes noted in the ankle.' These findings strongly suggest that claimant had previous ankle instability found later, which could have been present prior to the injury of December 17, 1981. Yet careful examination of the reports of Drs. Schiuma, Porth and Teperson reveals that none took a past medical history from the claimant in regard to previous ankle injury. Based on these considerations, I do not believe increasing the 14 percent disability of the leg is warranted."

By decision dated December 18, 1984 the Office issued appellant a schedule award for 14 percent permanent loss of use of the right leg. The period of the award ran from June 6, 1984 to March 15,

1986. The Office advised appellant that it would deduct $6,079.50 from his schedule award to liquidate its remaining third party credit.

On May 17, 1985 appellant filed an application for review with the Board. The appeal was docketed as No. 85-1393. By order dated July 10, 1985 the Board remanded the case to the Office for reconstruction of the case record and a *de novo* decision on appellant's schedule award. The Board noted that the record forwarded on appeal was devoid of any factual evidence relating to appellant's claim prior to December 1, 1983. The Board further noted that the $6,079.50 deducted from appellant's schedule award to liquidate the outstanding third party credit included $2,587.21 in continuation of pay which the Board, in *Paul L. Dion*,[2] found did not constitute compensation within the meaning of section 8132 of the Act and that the Office was not authorized under that section to recover continuation of pay received by a claimant in third-party recovery situations.

On remand, the Office reassembled the case record. By memorandum dated June 21, 1986 an Office claims examiner noted that the record was complete and contained no evidence which had not been considered in determining appellant's percentage of impairment for schedule award purpose. The Office issued a January 27, 1986 compensation order in which it reinstated the December 18, 1984 schedule award.

The Board finds that appellant has no more than a 14 percent impairment of his right lower extremity for which he received a schedule award.

For consistent results and to insure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A. *Guides to the Evaluation of Permanent Impairment* has been adopted by the Office as a standard for evaluating schedule losses, and the Board has concurred in such adoption.[3] The period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of his employment injury. Maximum improvement means that the physical condition of the injured member of the body has stabilized and will not improve further.[4] The determination of maximum medical improvement is not to be based on surmise or prediction of what may happen in the future.[5] A schedule award is appropriate where the physical condition of an injured member has stabilized, despite the possibility of an eventual change in the degree of functional impairment in the member.[6]

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[2] 36 ECAB 636 (1985).

[3] *Peter D. Eaton*, 36 ECAB 179 (1984); *Sterling F. Smith*, 28 ECAB 296 (1977).

[4] *Adela Hernandez-Piris*, 35 ECAB 839 (1984); *James T. Rogers*, 33 ECAB 347 (1981).

In determining the amount of appellant's schedule award, the Office relied on range of motion measurements provided by Dr. Porth, appellant's attending orthopedic surgeon. While Dr. Porth had estimated that appellant had a 40 percent permanent impairment of the right lower extremity, the Board notes that the physician's estimate was based, in part, on future post-traumatic changes which he stated had not been considered by the Office in determining the extent of impairment to appellant's right lower extremity. As possible or future changes in the degree of functional impairment of a member may not be properly considered, the estimate of impairment provided by Dr. Porth has little probative value in determining appellant's entitlement to a schedule award.

Following remand of the case, the record was reviewed by Dr. Collins, an Office medical consultant, who noted that there was no basis for changing the Office's previous schedule award determination. In concluding that appellant had a 14 percent impairment of his right lower extremity, the Office medical adviser took into consideration the range of motion loss of the right ankle as reported by Dr. Porth, together with the subjective symptoms of pain and discomfort as noted by appellant's attending physician. The Office thereafter requested Dr. Porth to review the calculation of the Office medical adviser and to advise the Office as to any factor it had failed to consider in arriving at its estimate of appellant's impairment. Dr. Porth responded, noting that the Office failed to consider future post-traumatic changes to appellant's right ankle; however, as noted above, such factors as possible further changes to a member may not properly be considered in arriving at the estimate of impairment for a member. For this reason, the evidence fails to establish that appellant has greater than a 14 percent permanent impairment to his right lower extremity for which he received a schedule award.[7]

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[5] *See Delmer Jones*, 28 ECAB 39 (1976); *Donald Stecky, Jr.*, 13 ECAB 522 (1962).

[6] *Santos Panzica*, 15 ECAB 458 (1964).

[7] On appeal, appellant alleged that the Office had not followed through with regard to reimbursement for recovery of continuation of pay. The Board notes that it does not have jurisdiction to consider appellant's allegation on the present appeal as there has not been any final Office decision with regard to this aspect of his claim. *See* 20 C.F.R. section 501.2(c).

The January 27, 1986 decision of the Office of Workers' Compensation Programs is affirmed.

In the Matter of BRENDA GETZ *and* U.S. DEPARTMENT OF AGRICULTURE, AGRICULTURAL MARKETING SERVICE, PROCESSED PRODUCTS INSPECTION BRANCH, Battle Creek, Mich.

Docket No. 87-975; Submitted on the Record;
Issued December 7, 1987

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issues are: (1) whether appellant sustained an emotional condition in the performance of duty; and (2) whether appellant has met her burden of proof in establishing that her emotional condition is causally related to factors of her employment.

On March 13, 1983 appellant, then a 34-year-old food inspector, filed a claim for an emotional condition. In an accompanying statement, she reported that the factors of employment responsible for her condition were unfair treatment, harassment, ridicule, uncertainty on the attitude of management, uncertainty on her status with management, and uncertainty from day to day or week to week where she was going to work. Appellant stopped working on February 10, 1984.

The employing establishment submitted a February 21, 1984 note from Dr. Joseph A. Bruno, a Board-certified family practitioner, who reported that appellant was to be excused from work for a transient emotional disturbance. In a February 28, 1984 note Dr. Bruno indicated that appellant could return to work the next day. The employing establishment also submitted a March 7, 1984 note from Dr. Hossein E. Tehrani, a psychiatrist, who indicated that appellant should be excused from work for an indefinite period beginning March 7, 1984 for emotional reasons.

In an April 10, 1984 letter, the Office of Workers' Compensation Programs requested that appellant provide a detailed history of her disability from the date it started. It also requested that she identify the specific factors which she believed contributed to her condition.

In a May 9, 1984 response, appellant stated that on March 14, 1983 the employing establishment sought a volunteer for a detail in the Chicago field office. Appellant was approached but declined to volunteer. Appellant related that in May 1983 a regional director informed her and a coworker that the established policy for travel was that full-time employees would travel to perform detail assignments away from their normal commuting area before full-time seasonal employees. Appellant indicated that she was a full-time seasonal employee with a regularly scheduled work assignment at a canning company in Lawton, Michigan which lasted approximately from May through October. Appellant reported that on July 29, 1983 she requested annual leave for three days in October and two days in November 1983. Her supervisor declined to approve the request and asked her to specify her first choice. Appellant indicated that she concluded her supervisor's reply arose from bad feelings against her.

Appellant stated that during the cherry pack, which involved seven-day work weeks, her supervisor informed her that help was needed in Chicago and instructed her to inform him if and when she had any free time. In an August 2, 1983 supervisor visit, the supervisor stated that full-time seasonal employees were not guaranteed six months work and were required to travel. Appellant commented that these statements were false and referred back to her refusal to go to Chicago on March 14, 1983. During the same visit, the supervisor informed appellant that another employee from the Battle Creek, Michigan office was working in Monkato, Minnesota. He commented that he could have sent appellant there and given appellant's assignment to the other employee but did not do so because he was "looking out" for appellant. Appellant stated that this kind of harassment of never knowing if she was going to be pulled out of a plant was very disturbing. She would become tense whenever her supervisor called or came on a supervisory visit.

Appellant indicated that she had informed her supervisor that she was afraid to work in Chicago. In a September 2, 1983 telephone conversation the supervisor stated that the longer appellant worked at her current assignment, the later it would be before she was sent to Chicago.

In October 1983, the supervisor informed appellant three days before the period for which she requested annual leave that there was no one to relieve her at her assignment. Appellant responded that plant management indicated that she would not be needed for the days she would be on leave. The supervisor approved the use of leave. Subsequently, appellant's plant assignment was completed and she went to a field office to complete reports. Her supervisor at that time indicated that the agency had lost money while she took annual leave in October 1983. Appellant indicated that she was furious because this reprimand was made in public.

Appellant indicated that she was instructed on October 28, 1983 to take a leave without pay because there was no work. On November 14, 1983 her supervisor informed her that help was needed in Chicago. Appellant indicated that she did not want to go. The regional director informed appellant that if she did not go, she would automatically be converted to intermittent status with no health benefits, life insurance, annual leave, sick leave or Civil Service Retirement. Appellant indicated that she went to Chicago under protest. She indicated that the regional director had indicated that if a full-time employee was available, he or she would go to Chicago. Appellant stated that during the week she worked in Chicago, a full-time employee was available who worked at appellant's former plant assignment.

Appellant stated that on November 16, 1984 she injured her ankle in a processing plant in Chicago. A physician in Chicago indicated that x-rays were negative and referred her to her personal physician. Her personal physician instructed her to stay off the ankle for a week and return to him on November 28, 1983.

On November 28, 1983 appellant's supervisor asked her to return to work, stating that the report from the physician in Chicago showed she was able to return to work. She returned on November 30, 1983 with a doctor's report concerning her ankle injury. She stated that her supervisor scolded her for taking time off, claiming she had been able to return to work.

On December 17, 1983 appellant's supervisor informed appellant that the employing agency needed help in Chicago the next week. Appellant indicated that she was ill. He instructed her to call back on December 19. Appellant reported in sick on December 19 and December 20 and was not sent to Chicago.

On December 28, 1983 appellant's supervisor informed appellant that she would be needed in Chicago for approximately three weeks, beginning January 3, 1984. Appellant went to Chicago on January 3, 1984 and filed a grievance the same day. At the end of the three-week assignment, appellant was asked if she could work another week in Chicago. Appellant declined. She was then given leave without pay for one week.

On January 27, 1984 appellant's supervisor informed her that she was needed in Chicago the next week. Appellant stated that she was not volunteering. The supervisor responded that appellant was the only person available. Appellant did not report as requested and was placed on absent without leave.

On February 3, 1984 appellant requested annual leave for February 10 and February 13 through February 17, 1984 and several hours for February 9, 1984 for an appointment. Her supervisor approved the leave request except for February 9, 1984. Appellant subsequently received approval for sick leave on February 9, 1984. Appellant returned to the field office on February 7, 1984 for the first time since December 28, 1983. She stated that she found that her desk had been moved to a laboratory. She indicated that she was devastated by this action.

Appellant saw her physician on February 9, 1984 and described her difficulty in sleeping and her bouts of crying. She used the annual leave granted to her. In a February 21, 1984 physician's visit, appellant's physician instructed her to take the week off because of an emotional disturbance. Appellant saw her physician again on February 28, 1984. He then instructed her to try to work again.

Appellant called the field office and indicated that she was available for work. On March 1, 1984, her supervisor stated that the employing agency needed help in Chicago for a two-week detail from March 5 to March 16, 1984. Appellant refused to go stating that the travel was not in her job description and contending that she was being harassed. The supervisor responded that if she did not go on the detail, she would be considered absent without leave. Appellant's physician referred her that day to a clinic for her emotional condition. Appellant reported on March 2, 1984 that she was going on sick leave due to an emotional condition.

In a May 11, 1984 letter the Office requested that appellant submit medical evidence in support of her claim. Appellant submitted a March 6, 1984 report from Dr. Robert E. Sydnor, a psychologist. He indicated appellant gave a history that, approximately one year previously, her employer began placing additional job demands on her. She related her belief that her employer wanted her out because she was highly paid. Dr. Sydnor diagnosed an adjustment disorder with mixed features.

In an October 19, 1984 decision the Office found that appellant had not met her burden of proof in establishing that her emotional condition was causally related to factors of her employment.

In an October 26, 1984 letter appellant requested reconsideration. She submitted treatment notes from Dr. Sydnor for the period March 6, 1984 through October 9, 1984. Dr. Sydnor indicated that appellant showed improvement after she began treatment. He noted that appellant gave a history of harassment since July 1983. In a June 5, 1984 note Dr. Sydnor indicated that appellant had returned to work. In a July 3, 1984 note, he indicated that appellant was upset about how she was being reassigned at work. Dr. Sydnor stated that the conflict of appellant with her supervisor was a stimulus for a depressive episode. In an October 9, 1984 report Dr. Sydnor indicated that appellant's work-related difficulties were in remission.

In a January 22, 1985 report Dr. Sydnor and Dr. Lauretta Chung, a psychiatrist, repeated the history given by appellant in the March 6, 1984 report. They indicated that appellant had become gradually more depressed in the prior year, noting that appellant was being required to cover the Chicago area which meant living in a motel and coming home on weekends. The physicians indicated that appellant was angry at the way the system operated at work. They found that she presented a moderate level of anxiety. The physicians found that appellant presented symptoms of anxiety and depression as a result of stresses from work. They diagnosed adjustment disorder with mixed features.

The Office referred the case record, with a statement of accepted facts, to an Office medical adviser. The statement indicated that a distinction existed between disability due to work duties as opposed to disability due to frustration. The statement contained a definition of the distinction but did indicate how it applied in appellant's case. In a May 2, 1985 memorandum the medical adviser stated that the case was unclear and might require substantiation or denial of some issues. He pointed out that it was not stated in the statement of accepted facts whether appellant, while working in a full-time position, actually had additional job demands since the prior year. He concluded from the information in the statement of accepted facts that there was no documentation for a work-related disability by the distinction made in the statement.

In a July 17, 1985 decision the Office vacated its October 19, 1984 decision and found that appellant's emotional condition did not arise out of or in the course of the performance of her assigned duties.

Appellant requested a hearing before an Office hearing representative. Appellant submitted a September 27, 1983 statement, repeating much of the information contained in her May 8, 1984 letter. She indicated that at the time she was informed on December 18, 1983 that she would be sent on a three-week detail in Chicago, two full-time inspectors volunteered to go to Florida during the same period but were sent neither to Florida nor to Chicago. She indicated that she returned to work on May 29, 1984.

At the June 2, 1986 hearing appellant repeated her previous descriptions of her employment factors. She testified that from October 1982 to February 1983 she was on a detail assignment in Michigan working 12 hours a day. She then received the first request from her supervisor to work in Chicago while she was on annual leave. She refused and another inspector was sent. She indicated that when she returned to the field office in February 1984, after her three-week assignment in Chicago, she found that everything had been taken out of her desk in the office and placed on top of another desk in the laboratory. Appellant stated that she returned to work on May 29, 1984 and worked until December 1984 when she converted from a full-time seasonal employee to intermittent status employee to avoid a detail from December 1984 until April 1985 in Greenville, Michigan. Appellant testified that processing plants in Chicago were difficult to work at because if a food inspector did not grade products the way plant operators wanted the products graded then the operators became angry or something would happen to the inspector's car. She indicated that the processing plants were located in "rough" neighborhoods. Appellant stated that her property was not damaged. She indicated that, for these reasons, food inspectors did not want the Chicago assignment. Appellant indicated that an equal employment opportunity complaint she had filed had been resolved with the employing establishment promising not to harass appellant, expungement of 32 hours of absent without leave and a monetary settlement.

Appellant submitted at the hearing a May 30, 1986 deposition from Dr. Bruno. He indicated that he first saw appellant on November 21, 1983 for her left ankle injury. He reported that when he examined her on February 9, 1984, she complained of ankle pain and was under a great deal of stress. He diagnosed a slowly resolving left ankle strain and depression. He stated that in his opinion, based on a reasonable degree of medical certainty, appellant's emotional condition was due to her employment injury. He further concluded that the frame of mind appellant was in would have made it exceedingly difficult for her to function.

Subsequent to the hearing, appellant submitted a June 20, 1986 deposition taken from Dr. Chung. She indicated that Dr. Tehrani, who had initially treated appellant, diagnosed an adjustment disorder with mixed emotional features, which was a reaction to harassment at work. Dr. Chung reported that she began treating appellant on April 9, 1984. She stated that she concurred in Dr. Tehrani's diagnosis of an adjustment disorder with mixed emotional features and in his statement of the cause, harassment at work. She indicated that appellant had no other causative factors except for her husband's unemployment. Dr. Chung commented she did not know whether this latter factor would cause additional stress to appellant because she did not mention it. She stated that in her opinion, appellant's emotional condition was triggered by the threat of being moved to another assignment, the confrontation with her supervisor and sexual innuendos at work.

In a January 13, 1987 decision the Office hearing representative found an emotional reaction related to appellant's travel assignment, disciplinary actions taken for refusal of such assignments, her expectations on how travel assignments should be made, her perception of discrimination in the making of travel assignments, and her perception of other matters related to her work did not occur within the performance of duty. The hearing representative stated that a compensable condition may arise from events which actually occurred but not from appellant's perception that the actions which did occur were unfair, discriminatory, or illegal. The hearing representative stated that appellant did identify factors of her employment which, if verified, would constitute factors of her employment from which a compensable disability would arise. He cited the supervisor's evaluation of appellant's performance and the money lost after she took annual leave in October 1983; the supervisor's statements in August 1983 concerning his intended assignments for appellant after October 1983; appellant's finding on February 3, 1984 that her desk had been moved without notice; receiving calls at home assigning work on several occasions, working long hours; and difficulties encountered while actually performing travel assignments. He concluded, however, that the medical evidence was insufficient to establish that appellant's emotional condition was related to those factors.

The Board finds that the case must be remanded for further development.

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within the coverage of workers' compensation. These injuries occur in the course of the employment and have some kind of causal connection with it but nevertheless are not covered because they are found not to have arisen out of the employment. Disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position, or secure a promotion. On the other hand, where the disability results from an employee's emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[1]

In this case, appellant claimed that her emotional condition was due to her detail assignment to Chicago and efforts by her supervisor to place her on other detail assignments to Chicago. Appellant stated at the hearing that she and her coworkers did not want to take detail assignments to Chicago because of the threat of violence or vandalism to the property of a food inspector if he or she did not grade processed food in accordance with the desire of plant managers. The detail assignment to Chicago constitutes specially assigned work duty within the language of *Cutler*. A disability arising out of an emotional reaction to a detail assignment or the working conditions involved in a detail assignment would therefore be within the coverage of the Act.

Appellant also contended that her emotional condition arose out of harassment and discrimination by her supervisor in assigning her to detail assignments in Chicago. Where the employee has alleged that the employment situation which caused her emotional reaction included actions taken by her supervisor which the employee described as constituting harassment or discrimination, the issue, generally speaking, is not whether in fact there was harassment or discrimination, but whether the disabling emotional reaction was precipitated or aggravated by conditions of employment.[2] In this case, the hearing representative stated that appellant's perceptions that the actions of her supervisor were unfair, discriminatory or illegal were not within the performance of duty. Appellant, however, testified at the hearing that she had filed an equal employment opportunity complaint and had received in settlement of the complaint a monetary award and a promise by the employing establishment not to engage in future discriminatory actions or harassment. This testimony would suggest that a finding has been made that appellant actually experienced discrimination and harassment in the manner in which detail assignments were given. However, there is no copy in the record of the results of the equal employment opportunity action and the hearing representative did not make any efforts to obtain information concerning this action which would be relevant evidence on whether the actions alleged constituted discrimination and harassment occurred within the performance of duty.[3]

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[1] *Lillian Cutler*, 28 ECAB 125 (1976); *Lizzie J. McCray*, 36 ECAB 419 (1985).

[2] *Dorothy J. Williams*, 32 ECAB 665 (1981).

Appellant submitted reports from Dr. Bruno, Dr. Tehrani, Dr. Chung and Dr. Sydnor and depositions from Dr. Bruno and Dr. Chung. Dr. Sydnor and Dr. Chung concluded in their January 23, 1985 report that appellant's emotional condition was related to her work. Dr. Chung and Dr. Bruno stated in their depositions that, within reasonable medical certainty, appellant's emotional condition was due to harassment at work. Dr. Chung specifically pointed out the threat of being moved to another assignment, which was the detail assignment to Chicago, and confrontations between appellant and her supervisor. Although Dr. Bruno and Dr. Chung did not provide sufficient medical rationale in support of their opinions, their statements are sufficient to require further development of the medical evidence.[4] The only contrary medical opinion is the memorandum of the medical adviser who stated that there was no documentation for a work-related disability within the distinctions cited by the statement of accepted facts. The statement of accepted facts presented to him, however, contained only the legal definition contained in *Cutler*. It did not specify what factors in appellant's case would or would not be considered within the performance of duty.[5] The medical adviser's opinion therefore is not based on an appropriate statement of accepted facts and is not sufficient to support a finding that appellant's emotional condition is not related to factors within the performance of her duty.

On remand, the Office should obtain records and information concerning appellant's equal employment opportunity action which would be pertinent to this case. The Office should then prepare a new statement of accepted facts, specifying, in accordance with this decision and prior decisions of the Board, the specific factors of appellant's employment which would be within the performance of duty. The Office should then refer appellant, together with the statement and the case record, to an appropriate specialist for an opinion on whether appellant's emotional condition was causally related to factors of employment within the performance of duty. After further development as it may find necessary, the Office should issue a *de novo* decision.

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[3] *See Rita L. Power*, 35 ECAB 403 (1983).

[4] *Horace Langhorne*, 29 ECAB 820 (1978).

[5] *See John A. Snowberger*, 34 ECAB 1262 (1983).

The decision of the Office of Workers' Compensation Programs, dated January 13, 1987, is hereby reversed and the case remanded for further action in accordance with this decision.

In the Matter of DANIEL J. BOYLE *and* U.S. POSTAL SERVICE, POST OFFICE, Worcester, Mass.

Docket No. 87-1508; Submitted on the Record;
Issued December 14, 1987

Before GEORGE E. RIVERS, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether appellant has more than a 14 percent permanent impairment of the right leg for which he received a schedule award.

On April 30, 1983 appellant, then a 50-year-old letter carrier, twisted his right knee when he "missed three stairs" after being startled by a dog while in the performance of duty. Appellant stopped working that day and did not return until September 6, 1983.

Appellant was diagnosed as having sustained an acute knee strain, a tear of the right knee medial meniscus, a torn posterior horn, osteochondritis, a lesion of the medial femoral condyle, and loose bodies. On May 11, 1983 the Office of Workers' Compensation Programs accepted appellant's claim for an acute right knee strain and on June 30, 1983 the Office accepted appellant's claim for a torn meniscus, right knee. By report dated June 30, 1983 Dr. Frank J. Waters, a Board-certified orthopedic surgeon and appellant's attending physician, indicated that on May 16, 1983 an arthroscopy was performed "with removal of posterior horn flap tear right medial meniscus. Shaving medial femoral condyle, drilling medial femoral condyle and tibial plateau."

By report dated February 28, 1984 Dr. Waters gave a history of appellant's injury and resulting surgery and indicated appellant continued to have intermittent symptoms with his knee. Dr. Waters stated:

> "The prognosis for the future has to be guarded, as he may develop a degenerative arthritis, especially in the medial compartment of the knee which may require possibly a High Tibial

> Osteotomy. Although at the moment he is able to function and work as a mail carrier.
>
> "There is no fluid in the knee joint at this time, but he does have some discomfort and pain intermittently in the knee. Range of motion is as follows—full extension. About 5-7 degrees of full flexion. There is some varus deformity in the knee. Other than this, from the arthroscopic surgery and exam, the fact that he had a posterior horn tear of the meniscus with evidence of osteochondritis, I think one has to be guarded in their final outlook for this man."

By report dated May 7, 1984 Dr. Waters stated:

> "I do feel Mr. Boyle has reached maximum improvement in his knee. He still has recurrent pain and swelling of the joint. There is still slight atrophy of his quadriceps muscle of about ½ inch. There is no ankylosis.
>
> "His subjective complaints are those of recurrent pain and swelling. Active motion is full extension, flexion is to about 120-170 degrees."

Dr. Waters indicated that appellant would eventually have degenerative arthritis in the knee, but could not predict when it would progress to the need for surgery. On September 18, 1984 Dr. Robert Y. Pick, an orthopedic surgeon acting as an Office medical adviser, reviewed Dr. Waters' May 7, 1984 report and on September 18, 1984 indicated that appellant had not yet reached maximum improvement as he still had some atrophy of the quadriceps muscles. Regarding the issue of a schedule award the Office medical adviser stated:

> "[Dr. Waters] indicates a range of motion of full extension, to flexion 'is to about 120-170 degrees.' I do not understand the amount of flexion the claimant has. Referring to Dr. Waters' previous letter of Feb. 28, 1984, Dr. Waters indicated that the knee range of motion is from full extension lacking about 5 to 7 degrees of full flexion. Based on the '*Guides* to the Evaluation of Permanent Impairment,' 2nd edition as published by the AMA table 37 on page 38 yields 3% impairment of the lower extremity for a retained active flexion between 140 and 150 degrees. An additional 5% impairment of the lower extremity should be assigned for a partial medial meniscectomy was noted by Dr. Waters on CA-20 dated 6/30/83 the claimant underwent "arthroscopy with removal of posterior horn flap

> tear right medial meniscus.' This gives a total of 10% impairment of the right knee."

On August 12, 1985 Dr. Waters submitted a report indicating that appellant had a left knee condition and related it to his previous right knee injury. Dr. Waters noted appellant had sustained a "tear in the posterior, medial horn of the meniscus with a lot of degeneration of the medial meniscus and some narrowing of the medial joint space," of his left knee. On August 19, 1985 a left knee arthroscopy with synovial shavings was performed.

By report dated September 20, 1985 Dr. Waters indicated appellant's right knee condition had stabilized with regard to improvement. He opined that appellant had residual disability with 25 percent loss of function in his right knee with various deformity. He noted that appellant would need a high tibial osteotomy and possibly a total right knee replacement.

By report dated November 6, 1985 Dr. Waters stated:

> "This man was injured on 4/30/83 when he slipped and injured the region of his right knee while working for the post office. He subsequently underwent an arthroscopy, debridement of knee joint with partial menisectomy and drilling of femoral condyle on 5/16/83. He returned to work on 9/6/83. He had continued to function fairly well up until 1985. He underwent an arthroscopy with shaving of the synovium of the knee with little result.
>
> "He has repetitive pain in the knee on weight bearing now with limitation of flexion of the knee of 10 degrees with pain on internal rotation of the knee, also has pain on medial stress. Subsequently he had had x-rays which show considerable narrowing of the medial joint space, although he has symptoms that are not severe at the moment in the right knee, his prognosis from the arthroscopic surgery and examination would indicate this patient would certainly have to have a high tibial osteotomy in the near future. He may probably, certainly need a total knee replacement eventually in view of the fact that his arthritis will be progressive. In view of his age, perhaps a high tibial osteotomy would be a better procedure for the near term to allow him to decrease the amount of pain and also his reliance on anti-inflammatory drugs and also enable him to resume work on a more permanent basis.
>
> "From the arthroscopic examination and the subsequent progression of his pain in the knee, I feel this patient at the

> present time has a 25 percent loss of function. This will probably progress to a more severe loss of function in view of the progressivity of the arthritis."

On November 18, 1985 Dr. Pick reviewed the medical record of evidence and noted symmetrical findings regarding appellant's knees, namely "osteochondritis of the medial femoral condyle and medial tibial plateau." Dr. Pick opined that appellant's left knee symptomatology was totally unrelated to his accepted right knee condition. Dr. Pick stated that the 'symmetrical finding of degenerative changes, is in my considered opinion, on the basis of an underlying preexisting condition of degenerative arthritis, and unrelated to claimant's factors of employment."

On January 27, 1986 appellant, the case record, a statement of accepted facts, and questions posed by the Office, was referred to Dr. John J. Canfield, a Board-certified orthopedic surgeon, to resolve a conflict in medical opinion between Dr. Waters and Dr. Pick on the causal relation of appellant's left knee condition to his right knee condition. In a January 27, 1985 report Dr. Canfield reviewed the case history and indicated that examination of the right knee revealed a mild varus deformity. He noted that appellant had full extension and flexion to approximately 130 degrees. Dr. Canfield diagnosed degenerative arthritis in both of appellant's knees and related appellant's left knee condition to his accepted right knee injury which caused "considerable favoring of the right lower extremity, thus aggravating and exacerbating some underlying arthritis of the left knee . . ." On February 3, 1986 the Office accepted appellant's claim for a torn cartilage in his left knee as a consequential injury.

On March 28, 1986, the Office determined that appellant was temporarily disabled from his position, and placed him on periodic compensation benefits.

On June 3, 1986 Dr. Canfield reevaluated appellant and on a report of that date indicated appellant had significant arthritis of his right knee that had been progressive. Dr. Canfield stated:

> "At the present time, the patient has constant achyness, and after any periods of inactivity, he has marked increased stiffness in the knee. The patient does walk with an antalgic gait, and has noticed increasing bowing. He has, in the past, undergone an arthroscopic examination with partial meniscectomy.
>
> "Examination of the patient's right knee reveals some chronic synovial thickening. There is a moderate varus angulation.

> There is one to two plus medial-lateral instability with palpable and audible crepitus with flexion with the patient lacking about five degrees of full extension, further flexion to beyond 90 degrees. The patient's right thigh measures 17¼ inches in circumference. This is essentially equal to the left thigh."

On August 18, 1986 the Office authorized vocational rehabilitation services and counseling for appellant.

By letters dated August 29, 1986, September 2, 1986 and October 23, 1986 the Office requested Dr. Canfield clarify his reports and submit specific information regarding the permanent impairment of appellant's knees. By letter dated October 20, 1986 Dr. Canfield responded that at the time of his last report he did not find appellant had reached maximum benefit. Dr. Canfield stated:

> "I did not feel at the time that I last evaluated the patient that he had reached maximum benefit from his treatment, namely, a high tibial osteotomy. My report did indicate specifically the patient's range of motion, that being a five degree flexion contracture with further flexion to 90 degrees with his range of motion being comparable bilaterally. The patient's x-rays did show moderate degenerative arthritis with the patient's diagnosis, therefore, being moderately severe degenerative arthritis of both knees, status post partial meniscectomies with moderate limitation of motion. According to the American Academy of Orthopedic Surgeons' Physical Impairment Manual, this would give the patient a rating of approximately 20 percent permanent impairment of each lower extremity. I feel that the patient's restrictions will indeed be on a permanent basis."

On December 5, 1986 Dr. Pick reviewed the case and noted that a bilateral knee condition had been accepted by the Office and that the A.M.A. *Guides* indicated a five percent impairment of each knee, based on the partial medial meniscectomies that were performed bilaterally. He indicated that the date of maximum medical improvement as a consequence of appellant's factors of employment had been reached within six months of the date of surgery at the most.

By compensation order dated December 17, 1986 appellant was issued a schedule award for a five percent permanent partial loss of use of his right leg. The period of award was from November 15, 1983 to February 23, 1984. No award was issued for appellant's left knee.

By letter dated December 30, 1986 appellant requested reconsideration of his claim contending that Dr. Canfield's report constituted the weight of the medical evidence and therefore he was entitled to a schedule award for a 20 percent permanent impairment to his right lower extremity.

By letter dated February 17, 1987 the office advised appellant that evaluation by another Board-certified specialist was warranted. The Office drafted a new statement of accepted facts pointing out that "it found a 5% permanent partial loss of use of the right leg . . . but due to a conflict of opinion, further evaluation is needed."

On February 17, 1987 appellant was referred, together with the case record, an augmented statement of accepted facts and questions to be resolved to Dr. St. G. Tucker Aufranc, a Board-certified orthopedic surgeon, for a "second medical exmination." In a report dated March 2, 1987 Dr. Aufranc reviewed the case record and history of appellant's present conditions and reported his findings upon examination. He indicated that appellant's right knee had a flexion of 124 degrees. Dr. Aufranc diagnosed: status post medial meniscectomy, right knee; status post arthroscopy, left knee; status post high tibial osteotomy, left knee with subsequent infection; and bilateral osteoarthritis of the knees with bow leg deformities. He noted that appellant had reached maximum medical improvement and stated:

> "On today's examination, positive findings consist primarily of bow leg deformities limitation of flexion in both knees, medial joint line tenderness in both knees, a positive McMurray's Test in both knees and previous x-ray examination demonstrated degenerative osteoarthritic changes. Mr. Boyle's subjective complaints are those of pain in the medial aspect of both knees and difficulty in walking, climbing, carrying or using the legs for any length of time. He also has a 3" wide scar on the left proximal tibia laterally and small, less than 1 cm., arthroscopic incision sites over both knees.
>
> "Based upon the previous meniscectomy and limitation of flexion, according to the AMA *Guides to the Evaluation of Permanent Impairment,* Mr. Boyle has a 19% impairment in the right lower extremity which results in an 8% impairment of the whole person.
>
> "Finally, based upon the history, it is my opinion that the right knee condition is related to the episode of April 30, 1983, which necessitated the meniscectomy of May 16, 1983, and it is

> likely that the left knee condition may have been aggravated putting more weight on the left and favoring the right."

On March 26, 1987 Dr. Pick reviewed the medical evidence of record and stated that a five percent impairment of the right lower extremity was applicable due to the partial medical meniscectomy. He noted that appellant's range of motion for knee flexion was 125 degrees and that maximum medical improvement was probably reached by September 6, 1983 (the date appellant returned to his regular occupational activities).

The Office requested that Dr. Pick submit further rationale in support of his opinion of appellant's permanent impairment using the A.M.A. *Guides*. On April 6, 1987 Dr. Pick responded, stating:

> "To respond to your inquiry of April 3, 1987, based on Dr. Tucker Aufranc's narrative medical report of March 2, 1987, and in conjunction with the '*Guides to the Evaluation of Permanent Impairment*,' second edition, as published by the American Medical Association that the following impairments are noted.
>
> "A 5% impairment for the partial right medial meniscectomy.
>
> "Although Table 37, page 38 of the '*Guides*' indicate a 9% impairment of the right lower extremity as a consequence of limitation of knee range of motion, it is my considered medical opinion—described previously in my March 26, 1987 medical report [page 1, paragraph before bottom], that the limitation of knee flexion being of symmetrical nature is 'due to claimant's mechanical status of his knees with 'bow-leggedness' and a component of obesity, limiting him from reaching full knee flexion.'
>
> "Since you inquired about schedule award impairment on the basis of Dr. Tucker Aufanc's report, the above combined [combined values chart, page 240 of the '*Guides*'] to a 14% impairment of the right lower extremity.
>
> "No additional impairment of the right lower extremity is applicable, even when considering Dr. Tucker Aufanc's description of knee joint ligament evaluation [page 10 of his March 2, 1987 narrative report] in which he indicated 1 plus ligamentous laxity of the right knee both on anterior and posterior Drawers, but in my considered medical opinion this is of no consequence, since the 'Lachman test' which is more specific

> for anterior cruciate ligament laxity was described as 'normal bilaterally.'
>
> "Relative to claimant's left knee, again based only on Dr. Tucker Aufranc's March 2, 1987 narrative medical report, a 9% impairment of the left lower extremity is applicable on his description of knee flexion of 125=.
>
> "I, again, strongly reiterate my position that the additional percent impairment noted in this report is solely based on Dr. Tucker Aufranc's March 2, 1987 narrative medical report, and does not reflect my considered medical opinion relative to a true residual relative to claimant's factors of employment, based on the *entire* medical evidence of record."

By decision dated May 8, 1987 the Office granted appellant a schedule award for 14 percent permanent partial loss of use of his right lower extremity, less the five percent previously awarded.

The Board finds that the case is not posture for decision.

In the instant case, appellant sustained injury to his right knee on April 30, 1983 while in the performance of duty. Appellant was treated, following injury, by Dr. Waters, a Board-certified specialist, who noted that appellant had a torn right medial meniscus and performed corrective surgery of the knee. In a subsequent report, Dr. Waters diagnosed a tear of appellant's left knee medial meniscus which he related to the right knee injury sustained by appellant. Dr. Pick, an Office medical adviser, reviewed the reports of Dr. Waters and noted that appellant's left knee condition was not causally related to the accepted right knee condition. Based on this conflict in medical opinion, the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Canfield, a Board-certified specialist, for an opinion on the relationship of appellant's left knee condition to the accepted right knee injury. In a report dated January 27, 1985, Dr. Canfield provided an opinion in which he related appellant's left knee condition, by aggravation, to the accepted right knee injury. Dr. Canfield was subsequently requested by the Office to provide a supplemental opinion on the nature and the extent of residual impairment to appellant's knees under the A.M.A. *Guides to the Evaluation of Permanent Impairment.*[1] Dr. Canfield responded on October 20, 1986, noting that he used the American Academy of Orthopedic Surgeon's Physical Impairment Manual and estimated that appellant had approximately 20 percent permanent impairment of each lower extremity.

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[1] For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A. *Guides* have been adopted by the Office, and the Board has concurred in such adoption, as a standard for evaluating schedule losses. *See Quincy E. Malone*, 31 ECAB 846 (1980).

The Board notes that following the receipt of Dr. Canfield's reports, the case record was referred back to Dr. Pick for further review and evaluation even though his report had created the conflict in medical opinion with Dr. Waters. This referral was in violation of the procedures of the Office.

FECA Bulletin No. 85-39 addresses the review of referee physicians' reports for the resolution of conflicts found under section 8123(a).[2] The Bulletin was promulgated after the Board's decisions in *Mary L. Kelly*[3] and *Richard M. Lewis,*[4] which found that it is improper for the Office medical adviser who is involved in creating a conflict of medical opinion to then review the report of the referee physician selected to resolve the conflict. Under this Bulletin, the Office formulated a procedural guideline that "In the future when an Office medical adviser is involved in the creation of a conflict of medical opinion, that medical adviser *may not* review the report of a referee physician obtained to resolve the conflict."[5] (Emphasis added)

In the present case, the Office erred in not following the procedures set forth in FECA Bulletin No. 85-51 and in referring the reports of Dr. Canfield for review by Dr. Pick.

The Board notes that, in response to the Board's decision in *Carlton L. Owens,*[6] the Office issued FECA Bulletin No. 85-51 which addresses improperly obtained medical opinions.[7] The Bulletin provides, in part, that "[t]he fact the District Medical adviser does not agree with a rationalized medical opinion from a referee specialist is not a ground for seeking a new referee. . . . Only if the selected physician fails to provide an adequate and clear response after a specific request for clarification may the Office seek a second opinion."[8] The Bulletin further notes that improperly obtained medical opinion evidence will not be given any weight on review.[9]

The Board finds that the reports of Dr. Pick, obtained after the referral of the record to Dr. Canfield, were improperly obtained and have no weight on review of the record.

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[2] FECA Bulletin No. 85-39 (issued July 5, 1985).

[3] Docket No. 85-422 (issued March 2, 1985).

[4] Docket No. 84-830 (issued November 30, 1984).

[5] FECA Bulletin No. 85-39 (issued July 5, 1985).

[6] 36 ECAB 608 (1985).

[7] FECA Bulletin No. 85-51 (issued August 30, 1985).

[8] *Id.*

[9] *Id.*

Further, the Board finds that Dr. Canfield's supplemental report did not adequately address the issue of residual impairment to appellant's knees. In this regard, Dr. Canfield was requested to apply the A.M.A. *Guides;* however, his October 20, 1986 report noted that he applied a different manual in determining the extent of permanent impairment to appellant's knees. As the supplemental report of Dr. Canfield did not adequately respond to the Office's request for an assement under the A.M.A. *Guides*, the Board finds that the case must be referred to a new impartial medical specialist for a proper evaluation of the nature and extent of permanent impairment to appellant's knees.[10]

With regard to the medical opinion obtained from Dr. Aufranc, the Board notes that the report was obtained by the Office in a manner other than that described under the Federal Procedure Manual for the selection of medical referee examinations.[11] These procedures contemplate that impartial specialists be selected on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and the Office.[12] Since Dr. Aufranc was not selected on the rotation basis, this objective was not met and his report will not be considered by the Board on this appeal.

For the above stated reasons, the case will be remanded to the Office to refer appellant to a new impartial medical referee physician for examination and evaluation of appellant's permanent impairment in accordance with the standards established under the A.M.A. *Guides*. The medical specialist should be requested to fully describe all residual impairment in terms of range of motion, appellant's partial meniscectomies, and any pain or loss of sensation and explain his findings and conclusions in accordance with the applicable sections of the *Guides*. After receipt of the impartial specialist's report, and review by an Office medical adviser not previously connected with the case, the Office shall issue a *de novo* decision on all aspects of the case, including entitlement to schedule awards for both legs, and temporary total disability benefits.

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[10] In situations where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist in order to correct the defect in the original report. However, where such clarification or elaboration is not forthcoming, the Office must submit the case record together with a detailed statement of accepted facts to a second impartial specialist for a rationalized medical opinion on the issue in question. Unless the above-mentioned procedure is carried out by the Office, the intent of section 8123(a) of the Act will be circumvented. *See Harold Travis*, 30 ECAB 1071 (1979).

[11] *See* Federal (FECA) Procedure Manual, Chapter 3-400, Part 3, Medical Referee Examinations (October 1978).

[12] *Nancy E. Woodruff*, Docket No. 87-827 (issued June 17, 1987).

The May 8, 1987 decision of the Office of Workers' Compensation Programs is set aside; the case is remanded to the Office for further development to be followed by a *de novo* decision on all aspects of the case.

In the Matter of LOUIS G. PSYRAS *and* U.S. POSTAL SERVICE, POST OFFICE, Boston, Mass.

Docket No. 87-176; Submitted on the Record;
Issued December 16, 1987

Before DAVID S. GERSON, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether appellant had any disability causally related to his September 26, 1975 and October 2, 1975 employment injuries after March 9, 1984, the date the Office of Workers' Compensation Programs terminated his compensation.

On September 26, 1975 appellant, then a 45-year-old electrician, developed low back pain at work while he was holding up a door with a 50 pound counterweight.[1] Appellant continued to work, but on October 2, 1975 his back pain was aggravated when he was lifting a tool box at work. Appellant received medical treatment from the Massachusetts General Hospital on October 2, 1975 where his condition was diagnosed as back sprain, muscle spasms. The Office of Workers' Compensation Programs determined that appellant sustained a back strain as a result of the employment injuries, and approved the payment of continuation of pay during appellant's work absences from October 4, 1975 to October 19, 1975 and from October 23, 1975 to November 2, 1975.

Medical evidence of record shows that appellant consulted Dr. Edwin T. Wyman, a Board-certified orthopedic surgeon, on October 30, 1975, and in a report of that date he stated that appellant complained of nonradiating low back pain, and that examination revealed some tenderness and loss of motion in the low back, normal x-ray results, and normal neurological responses. Dr. Wyman diagnosed an acute back strain which "should resolve itself without permanent disability in about another 4 weeks." Dr. Wyman also recommended light duty for a period of 30 days.

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[1] The record shows that appellant also developed elbow pain at the time of the September 26, 1975 injury, but that these symptoms resolved shortly thereafter.

Except for one consultation with the employing establishment health unit in December 1975, there is no indication that appellant sought medical treatment for his back again until January 24, 1977 when he again consulted Dr. Wyman. According to Office notes of that date Dr. Wyman stated that appellant reported that he had experienced mild discomfort at the right pelvic attachment of the right paravertebral muscle since his 1975 consultation, and that results of his examination of appellant were essentially normal except for a mild spasm and some narrowing of the L5–S1 disc space shown on x-ray. Dr. Wyman diagnosed "residual back strain" and opined that appellant "may have a mild disc protrusion."

Dr. Wyman's treatment notes reveal that appellant continued to experience recurrent nonradiating back pain, and on April 30, 1977 stopped work and did not return until May 14, 1977. Appellant stopped work again on July 2, 1977, and he did not return. He subsequently retired on disability on January 20, 1978.

Medical evidence of record shows that appellant was evaluated by Dr. S. Jayasankar, Board-certified in physical medicine, on July 14, 1977. Dr. Jayasankar noted back pain "without radiation and without neurologic symptoms," and diagnosed low back strain. In addition, Dr. Jayasankar stated that appellant "could well have a mild disc protrusion but without objective roots signs."

Appellant came under the care of Dr. John J. Walsh, a Board-certified orthopedic surgeon, on August 8, 1977. In a report dated September 16, 1977 Dr. Walsh reported that while appellant's straight leg raising, deep tendon reflexes, and motor and sensory examination were within normal limits, a myelogram performed on September 13, 1977 showed disc herniation at L4–5.

On his original claim, appellant indicated that he was in receipt of Veterans Administration benefits for disability relating to his feet and back. At the request of the Office, the Veterans Administration submitted its records which revealed that appellant received ten percent disability related to his back. Medical records from June 1972 revealed that appellant had a history of low back strain, and that he is "getting worse pain in his back as time goes on."

The Office requested appellant to submit rationalized medical opinion evidence regarding the relationship between his back condition and his employment. While Dr. Walsh submitted medical reports which consistently supported appellant's claim that his back condition was causally related to his 1975 employment injuries, these reports did not contain supporting medical rationale. In addition, there is no indication that Dr. Walsh was aware of appellant's history of back complaints prior to his employment. In spite of these deficiencies, the Office determined that appellant had sustained low back strain and a herniated disc as a result of his employment injuries, and paid compensation benefits for appellant's claimed recurrent disability during the period from April 30, 1977 to May 13, 1977 and commencing on July 2, 1977 and thereafter.

Appellant remained under Dr. Walsh's care and he submitted periodic reports stating that appellant continued to be totally disabled due to his back condition. In September 1980 the Office referred appellant, along with the case record and a statement of accepted facts, to Dr. Robert Shapiro, a Board-certified orthopedic surgeon, for a second opinion. In a report dated January 21, 1981 Dr. Shapiro described appellant's history and reported a paucity of physical findings; noting some limitation of back motion, no neurologic abnormalities, and no tenderness of the back. Dr. Shapiro diagnosed low back strain, herniated disc L4-5, spondylosis of the lumbar spine and stated that appellant was partially disabled due to these conditions and that he was capable of performing many sedentary occupations. With regard to causal relationship, Dr. Shapiro stated that it was "impossible" to determine to what degree appellant's disability was due to his low back problems which developed while he was in the military or due to his employment. Dr. Shapiro concluded that appellant's disability was "related partly to his preexisting spondylosis, and partly to the accident of October 2, 1975, it is impossible to state when it occurred, although it is reasonable to assume that if he had no lower limb symptoms prior to his industrial accident, can be attributed to that accident."

The Office determined that there was a conflict in the medical evidence on the issue of whether appellant was totally or partially disabled, and referred him, along with the case record and a statement of accepted facts, to Dr. Paul W. Hugenberger, a Board-certified orthopedic surgeon, for a referee opinion. In a report dated July 7, 1981 Dr. Hugenberger described appellant's history and reported that his findings on physical examination were "essentially normal." Dr. Hugenberger stated that "one can certainly not make a diagnosis of a ruptured intervertebral disc on the basis of his orthopedic examination today since it is remarkably normal." In addition, Dr. Hugenberger stated that x-rays taken of appellant's spine were also not consistent with an alleged disc injury in 1975. Dr. Hugenberger therefore questioned the myelogram interpretation of a herniated disc, and stated, "I wonder if the total protein in the spinal fluid was normal, and whether or not the defect seen could be associated with the placement of the needle." Dr. Hugenberger opined that his objective findings were insufficient to confirm a diagnosis of either low back strain, or disc protrusion, and instead diagnosed "recurrent low back strain by history." Dr. Hugenberger concluded that at present he found no orthopedic disability "but by history he claims he will have pain if he is too active, so I would have to say he is partially disabled." With regard to the relationship between appellant's recurrent back pain and his employment, Dr. Hugenberger stated that some of appellant's back pain may be secondary to appellant's "pronated feet with foot strain." Dr. Hugenberger also stated that he was unsure whether appellant's back pain was due to a preexisting condition or to the 1975 employment injuries, but he stated that the 1975 injury "was certainly an aggravation" which based on appellant's work record "has interfered with his working ever since that time."

Based on Dr. Hugenberger's report, the Office subsequently determined that appellant did not sustain a herniated disc as a result of the 1975 employment injuries, and rescinded its acceptance of that condition. The Office also determined that appellant was partially disabled due to the accepted low back strain condition, and performed a loss of wage-earning capacity evaluation of appellant. By decision dated August 25, 1981 the Office determined that appellant was capable of performing the duties of an order clerk, and reduced his compensation effective September 10, 1981 to reflect this wage-earning capacity.

Appellant requested reconsideration of the August 25, 1981 loss of wage-earning capacity determination, and by compensation order dated March 29, 1982 the Office denied this request for reconsideration. Appellant requested a hearing which was held on September 21, 1982. In a decision dated May 23, 1983 and finalized May 26, 1983 the Office hearing representative affirmed the Office's August 25, 1981 and March 29, 1982 decisions.[2]

The Office placed appellant in its vocational rehabilitation program on February 15, 1982 and compensation for temporary total disability was reinstated commencing on that date. Efforts to rehabilitate appellant culminated in placing appellant in a part-time position as an electronics technician at a wage of $5.75 per hour beginning on June 1, 1982. Although appellant worked part-time beginning on June 1, 1982 he continued to receive compensation for temporary total disability under the auspices of the Office's vocational rehabilitation program until September 8, 1982. On September 8, 1982 the Office reinstated its August 25, 1981 loss of wage-earning capacity determination, and an internal Office memorandum dated September 10, 1982 noted that the amount appellant had been overpaid from June 1, 1982 to September 8, 1982 "will be calculated later."

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[2] The Board notes that appellant did not base his objection to the August 25, 1981 loss-of-wage-earning capacity determination on a claim that he was physically incapable of performing the position, but in fact he conceded that he believed that he was physically capable of performing the duties of the position. Appellant's objection was instead based on the contention that the position required a typing skill which he did not possess, and that the position paid a wage which was lower than what the Office had determined.

On November 21, 1982 appellant was laid off from his electronics technician job, and he requested additional vocational rehabilitation assistance from the Office. On November 10, 1983 the Office authorized appellant to commence a two year vocational retraining program in accounting at a commmunity college to begin on January 23, 1984.

On November 14, 1983 the employing establishment offered appellant a job as a custodian at the pay rate of the position he held when he was injured. By letter dated November 23, 1983 appellant declined to accept the offered position because he wished to pursue vocational retraining in accounting.

By compensation order dated January 30, 1984 the Office canceled appellant's enrollment in its vocational rehabilitation training program on the ground that he had been offered a position within his physical restrictions by the employing establishment. In a letter dated February 6, 1984 appellant requested a hearing on this decision.

In another compensation order dated February 21, 1984 the Office terminated appellant's disability compensation benefits effective March 9, 1984 on the ground that he refused suitable work. In a letter dated March 14, 1984 appellant requested a hearing on this decision.

On April 4, 1984 the Office issued a preliminary determination that appellant had received an overpayment of compensation in the amount of $3,003.58 because during the period from June 1, 1982 to September 8, 1982 he had been receiving compensation for total disability under the auspices of the Office rehabilitation program while he was working as an electronics technician. An internal Office memorandum reveals that the Office arrived at this figure by subtracting the amount he would be entitled to had he received compensation based on the August 25, 1981 loss of wage-earning capacity determination from the amount he was actually paid for temporary total disability during the period in question. The Office also made a preliminary determination that appellant was at fault in the creation of the overpayment. On April 27, 1984 appellant requested a hearing on this preliminary decision.

On May 9, 1984 appellant filed an appeal before the Board of the Office hearing representative's May 26, 1983 decision regarding the loss of wage-earning capacity issue, but in a letter dated June 28, 1984 he requested the Board to withdraw the appeal so that he could pursue "the other matters pending at the Office." In an order dated July 13, 1984 the Board granted appellant's request to withdraw the appeal.

Upon return of the case record to the Office, it was reviewed by an Office hearing representative. In a decision dated and finalized October 10, 1984 the hearing representative determined that the Office had failed to meet its burden of proof in determining that appellant's loss of wage-earning capacity benefits should be terminated effective March 9, 1983 on the grounds that he refused to accept suitable work. The Office hearing representative therefore vacated the Office's February 21, 1984 termination decision and remanded the case to the District Office for further development of the medical evidence on appellant's employment-related work limitations. The Office hearing representative also postponed hearings on the April 4, 1984 overpayment preliminary determination and the January 30, 1984 denial of vocational training pending a *de novo* decision of the termination of compensation issue.

By letter dated November 9, 1984 appellant, claimed that he had sustained a recurrence of total disability commencing on January 25, 1984.

In support of this claim appellant submitted a medical report showing that he had been treated at the Massachusetts General Hospital Emergency Room on January 25, 1984 for complaints of back pain. The emergency room physician diagnosed low back syndrome, possible herniated nucleus pulposus, and recommended bed rest. X-rays taken on that day revealed degenerative changes at L4-5 and L5-S1. Appellant received follow-up treatment as an outpatient at the orthopedic clinic of the hospital; and due to the persistence of his symptoms he underwent a CT scan on May 10, 1984 which showed results "compatible with central herniated disc at L4-5."

Appellant consulted Dr. Walsh on May 15, 1984, and according to his treatment notes, he recommended hospitalization for a lumbar myelogram and chemonucleolysis treatments. In a report dated June 19, 1984 Dr. Walsh stated that appellant was "totally disabled presently."

A lumbar myelogram was performed on August 7, 1984 which did not show any evidence of a herniated nucleus pulposus, or any other abnormality. Appellant underwent chemonucleolysis on September 12, 1984 and in a report of that date Dr. Walsh indicated that a saline acceptance discography performed at that time revealed "marked incompetence of L4-5." Dr. Walsh also gave a postoperative diagnosis of ruptured lumbar intervertebral disc L4-5.

Dr. Walsh subsequently submitted periodic medical reports indicating that appellant continued to be totally disabled due to his back condition.

An Office medical adviser reviewed the record, and in a report dated March 26, 1985 indicated that he disagreed with Dr. Walsh's diagnosis of ruptured disc. Instead, the Office medical adviser opined that the 1975 employment injury resulted in nothing more than a back strain, and that the medical evidence failed to establish that medical treatment received by appellant on and after January 25, 1985 was for residuals of this strain injury.

On May 17, 1985 the Office referred appellant, along with the case record and a statement of accepted facts, to Dr. Julian Ungar-Sargon, a Board-certified neurologist, for a complete evaluation and a rationalized opinion to resolve the conflicting medical opinions in this case. In a report dated June 4, 1985 Dr. Ungar-Sargon described the history of appellant's condition and his findings in detail, and concluded that appellant sustained a low back strain as a result of the 1975 employment injury, but that residuals from this injury had resolved prior to January 25, 1984. Dr. Ungar-Sargon also disagreed with Dr. Walsh's diagnosis of disc herniation, but instead stated that his examination revealed meralgia paresthetica which developed as a result of the chymopapain injection appellant received in September 1984, and that this diagnosis was unrelated to the 1975 injury.

On December 23, 1985 the Office issued a decision terminating appellant's compensation benefits effective March 9, 1984 on the ground that appellant no longer had any employment-related disability after that date. The Office further found that the weight of the medical evidence failed to establish a causal relationship between appellant's herniated disc at L4-5 and accompanying treatments, and the October 2, 1975 employment injury. In regard to the latter finding the Office stated that the weight of the medical evidence failed to establish that the herniated disc "for which treatment was given from January 25, 1984 and surgery performed September 11, 1984 is not established as due to injury sustained October 2, 1975."

Appellant subsequently requested a hearing which was held on May 27, 1986. Appellant also submitted a deposition of Dr. Walsh taken on March 13, 1986. Dr. Walsh described the course of appellant's condition, and defended his diagnosis of herniated nucleus pulposus. Dr. Walsh also stated that he believed that the 1975 injury caused the herniated nucleus pulposus. Dr. Walsh again opined that appellant sustained a recurrence of total disability due to the 1975 injury commencing on January 25, 1984. In addition, he stated that appellant has shown improvement since January 25, 1984 to the point that he was essentially asymptomatic as of his last visit on March 10, 1986. Although Dr. Walsh stated that appellant was no longer totally disabled, he recommended certain work restrictions to prevent reinjury in the future.

In a decision dated and finalized July 31, 1986 the Office hearing representative affirmed the Office's December 23, 1985 termination decision. The Office hearing representative also stated appellant was not entitled to rehabilitation services because his benefits were properly terminated effective March 9, 1984; and therefore the issue of appellant's entitlement to vocational training is not before the Office at this time. In addition, the Office hearing representative determined that further development of the record was necessary on the overpayment issue, and remanded the case to the District office for recalculation of the overpayment and a *de novo* determination on that issue.

The Board finds that the weight of the medical evidence establishes that appellant no longer had any disability causally related to his 1975 employment injuries after March 9, 1984.

Dr. Walsh, a Board-certified orthopedic surgeon and appellant's treating physician, submitted medical opinion evidence indicating that appellant had sustained a herniated disc as a result of the 1975 employment injuries, and that he continued to suffer disability from this condition after March 9, 1984. On the other hand, an Office medical adviser opined that appellant merely sustained a back strain as a result of the 1975 employment injuries, and that residuals from these injuries had resolved prior to March 9, 1984. This difference in opinion created a conflict in the medical evidence on the issues of the nature and duration of appellant's employment-related conditions, necessitating referral to an impartial medical specialist for a rationalized medical opinion to resolve these medical questions. Accordingly, the Office referred appellant, along with the case record and a statement of accepted facts, for a referee opinion. In a report dated June 4, 1985 Dr. Ungar-Sargon reported the history of appellant's condition and his findings upon examination and indicated that he disagreed with the diagnosis of herniated disc. Noting that the 1977 myelogram results showed findings consistent with disc herniation at L4-L5, Dr. Ungar-

Sargon opined that these results were questionable, stating "it is quite suspicious that [there was a herniation] only one level below where the needle was placed" and therefore "it worries me that the needle puncture itself may be the cause of the dye column indentation." Dr. Ungar-Sargon reviewed the May 10, 1984 CT scan which had also been interpreted by Dr. Walsh as showing findings consistent with a central herniated disc at L4-L5, and agreed with the Office medical adviser's opinion that this CT scan did not suggest a pathological disc herniation. Dr. Walsh stated that the protrusion of the disc did not impinge on the spinal canal, the perineural fat was normally maintained and therefore there was no evidence of pressure on the neural foramen. In addition, Dr. Ungar-Sargon pointed out that results of another myelogram performed in 1984 were normal. Dr. Ungar-Sargon also stated that his physical examination of appellant, which included a neurological exam, did not reveal evidence of disc herniation or radiculopathy, and that an EMG performed under his supervision was normal with no evidence of previous root irritation or chronic change to suggest an old radiculopathy. Dr. Ungar-Sargon therefore disagreed with Dr. Walsh's opinion that the 1975 employment injuries resulted in a herniated disc. Based on his review of the record and his examination Dr. Ungar-Sargon instead opined that the 1975 employment injuries resulted in back strain with no objective signs of root irritation and that this condition was resolved prior to appellant's January 25, 1984 emergency room consultation. Dr. Ungar-Sargon also opined that appellant's continuing symptomatology which calls for some work limitations is consistent with a diagnosis of meralgia paresthetica affecting the right leg which is not related to the 1975 injuries. Instead, Dr. Ungar-Sargon implicated the chymopapain injection received by appellant in 1984 as a causal factor in the development of this condition. Dr. Ungar-Sargon's opinion is consistent with the contemporaneous medical reports which show that following the 1975 injury appellant complained of nonradiating back pain and that he showed normal neurological responses upon examination. These reports also contain diagnoses of back sprain, muscle spasms and there is no mention of even the possibility of a herniated disc until almost 16 months after the injuries occurred. The Board finds the report of Dr. Ungar-Sargon, which is well-rationalized and based on a thorough review of the record and a comprehensive examination of appellant, to be persuasive. It therefore represents the weight of the medical evidence and establishes that appellant no longer had any employment-related disability after March 9, 1984.[3]

Although subsequent to Dr. Ungar-Sargon's evaluation, appellant submitted a deposition of Dr. Walsh in which he explained his reasons for diagnosing a herniated disc, this testimony is deficient because he does not provide convincing medical rationale for his opinion that the diagnosed disc condition was caused by the 1975 employment injuries. The only reason he gave for this opinion was that appellant "was active and well until an episode of lifting in 1975 resulting in back pain of a nature to cause a clinician to suspect a ruptured L4-5 disc." This explanation is not supported by the factual evidence of record which shows that appellant had back pains dating back at least as early as 1972 for which he received disability compensation from the Veterans Administration. In addition, as has been stated, no mention of the possibility of a disc injury was even mentioned by a physician until 16 months after injury occurred. The Board therefore finds that Dr. Walsh's March 13, 1984 deposition is insufficient to overcome the weight of the medical evidence.

Appellant, through his attorney, contends on appeal that the Office paid his medical bills "on or about October 30, 1984 and February 1, 1985" for expenses incurred for medical treatment administered to him at Massachusetts General Hospital for "his January 25, 1984 recurrence and CT scan of May 10, 1984." As noted above, appellant complained of back pain on January 25, 1984 which was diagnosed on physical examination as low back syndrome and possible herniated nucleus pulposus; x-ray examination revealed degenerative changes at L4-5 and L5-S1. Appellant continued receiving treatment on an outpatient basis and ultimately underwent a CT scan on May 10, 1984. Appellant's attorney noted that the Office had accepted appellant's herniated disc as employment-related. He concluded, therefore, that since these expenses were incurred for appellant's herniated disc "it is incongruous that O.W.C.P. should later deny responsibility for that condition and its related work disability periods." Additionally, appellant, through his attorney, contended that although the Office had authorized appellant's hospitalization at Whidden Memorial Hospital in September 1984, at the recommendation of Dr. Walsh, for chemonucleolysis, the Office was now declining to pay the expenses incurred

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[3] When a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical opinion evidence, the opinion of such specialist if sufficiently well-rationalized and based on a proper factual background must be given special weight. *James P. Roberts*, 31 ECAB 1010 (1980).

"thereby burden[ing] the employee with an undue financial hardship."

With regard to whether the Office authorized appellant's hospitalization for a CT scan, chemonucleolysis and other attendant treatments during the intermittent period beginning January 25, 1984, the Board finds that the record does not contain any prior written authorization from the Office for these various medical treatments; [4] such written authorization would also encompass any oral authorization subsequently confirmed in writing.[5] Moreover, there is no evidence of record that the CT scan, chemonucleolysis and attendant treatments were performed because of any existing emergency situation. This is especially true since the CT scan was taken approximately four months after the emergency room treating physician diagnosed a herniated nucleus pulposus, and the chemonucleolysis was performed approximately eight months after the diagnosis was rendered. The Board notes that in the absence of an emergency, an employee may not recover the costs of medical care obtained without prior approval by the Office.[6] Thus, the Board finds that since no emergency situation existed which prompted appellant to secure the medical services rendered, the Office is under no obligation to pay these expenses.

Further, based on the report of the impartial medical specialist Dr. Ungar-Sargon, the Office determined on December 23, 1985 that back strain was the only employment-related condition. Earlier on August 25, 1981 based on a previous conflict in the medical evidence, the Office by compensation order had rescinded its prior acceptance of a herniated disc. The Board notes that in order to establish entitlement to medical benefits under the Federal Employees' Compensation Act,[7] that is, treatment or reimbursement of past medical expenses incurred,[8] appellant must establish that the expenditures were incurred for treatment of the effects of an employment-related injury.[9] The Board finds that since Dr. Ungar-Sargon's report constitutes the weight of the medical evidence and establishes that appellant's herniated disc is not employment related, the Office is under no obligation to assume responsibility for expenditures incurred relative to this condition. The Board further finds that the fact that the Office may have paid for expenses related to appellant's herniated disc beginning January 25, 1984 is not sufficient to constitute acceptance of a claim, nor does it create a liability on the Office to furnish compensation benefits in the absence of an employment-related disability.[10]

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[4] *See* 20 C.F.R. section 10.402 and Federal (FECA) Procedure Manual, Chapter 3–300, *Official Authorization for Examination and/or Treatment*, Part 3—Medical.

[5] Federal (FECA) Procedure Manual, Chapter 3-300, Official Authorization for Examination and/or Treatment, Part 3—Medical. *See also Bruce W. Graham*, Docket No. 86–538 (issued July 7, 1986); *Lavern K. Brooks*, Docket No. 85–1394 (issued November 29, 1985).

[6] *Manohar Singh*, 37 ECAB 821 (1986); *Mildred A. Lindall*, 35 ECAB 287 (1983).

[7] 5 U.S.C. section 8103.

[8] *Maurice J. Dayton*, 11 ECAB 139 (1959).

[9] *Zane H. Cassell*, 32 ECAB 1537 (1981).

For the foregoing reasons, appellant's contentions on appeal are wholly without merit.

With regard to the issue of appellant's entitlement to vocational training, the Board finds that this issue is not before it at this time because the medical evidence establishes that appellant had no disability after March 9, 1984. He therefore is not entitled to any compensation benefits, including vocational training services, after March 9, 1984. Regarding the issue of the overpayment during the period from June 1, 1982 to September 9, 1982, the Board finds that this aspect of appellant's claim is not before it at this time because the Office hearing representative has determined that further development of the record and a *de novo* decision is necessary on this issue. Since the record does not contain a final decision on the overpayment issue, it is in an interlocutory posture and the Board lacks jurisdiction to consider it.[11]

The December 23, 1985 and the July 31, 1986 decisions of the Office of Workers' Compensation Programs are affirmed.

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[10] *Nicolea Bruso*, 33 ECAB 1138 (1982).

[11] *See* 20 C.F.R. section 501.2(c).

In the Matter of THOMAS D. PETRYLAK *and* U.S. POSTAL SERVICE, POST OFFICE, Utica, Mich.

Docket No. 86-1961; Hearing November 5, 1987; Issued December 17, 1987

Appearances: *Joseph F. Petrylak, Esq.*, for appellant; *Sheldon G. Turley, Jr., Esq.*, for the Director, Office of Workers' Compensation Programs.

Before GEORGE E. RIVERS, DAVID S. GERSON, MICHELE VON KELSCH

The issue is whether appellant's disability causally related to his May 26, 1984 employment injury ended by June 9, 1984.

On May 26, 1984 appellant, then a 30-year-old letter carrier, filed a claim for a dog bite to his left calf sustained that day. Appellant stopped work at noon on May 26, 1984, and the employing establishment referred him to Troy Industrial Medical Center for examination and treatment.

In a May 26, 1984 report Dr. John A. Geralt, the medical director of Troy Industrial Medical Center and a specialist in occupational medicine and emergency medicine, diagnosed "superficial laceration to distal/lateral leg with contusion and ecchymosis" and indicated appellant could resume his regular work on May 26, 1984.

Appellant returned to work on his next scheduled workday, May 29, 1984 performing light duty in accordance with a May 29, 1984 report from Dr. Geralt which stated that he should perform a "sit down job" for the next three to five days. In a May 31, 1984 report Dr. Geralt stated that this "sit down job" should continue for another three to five days.

Appellant stopped work on May 31, 1984 after working about one hour because he felt ill.

In reports dated June 1, 1984, June 4, 1984 and June 6, 1984 Dr. Geralt diagnosed a dog bite wound on left lower leg, and indicated appellant was totally disabled from June 1, 1984 to June 8, 1984.

In a June 8, 1984 report Dr. Geralt indicated appellant was totally disabled from June 8, 1984 "until release by his own doctor." In another June 8, 1984 report Dr. Geralt indicated appellant's return to work was "pending," that he had been referred to his own doctor, and that he was to return to the clinic if necessary.

In a June 15, 1984 report Dr. Geralt stated that the original diagnosis was "transverse superficial lacerations (2) to distal leg lateral aspect with contusion and ecchymosis to left leg" and that the present diagnosis was "Same with low grade fever." Dr. Geralt indicated that no further treatment was needed and there was no further disability from work and stated:

> "Dog bite appeared to be healing satisfactorily at the time of the last visit on June 8, 1984. Patient complained of headache and fever. A blood test was drawn on June 6, 1984 and a normal white count and differential was found. The red blood cells, hemoglobin and hematocrit were high.
>
> "Patient was told that his symptoms did not appear to be due to the dog bite. To be sure further studies are necessary and they must be done by his own doctor."

In a June 26, 1984 report Dr. Geralt stated that appellant had been discharged on June 8, 1984 and referred to his own doctor for follow-up treatment.

In a June 27, 1984 report Dr. Fikry F. Ibrahim, a Board-certified internist, indicated that appellant was totally incapacitated beginning June 8, 1984. In a June 27, 1984 report Dr. Ibrahim stated:

> "[Appellant] is suffering from fever of unknown origin, dizziness, generalized weakness and pain in left leg.
>
> "Causative factor not yet determined. Work up is in progress, to rule out Guillan Barre syndrome."

In a July 5, 1984 report Dr. Geralt stated that appellant was partially disabled from May 29 to May 31, 1984, that he was taken off work on May 31, 1984 when a low grade fever developed, and that he was totally disabled from June 1 to June 8, 1984.

In a July 6, 1984 report Dr. Ibrahim stated:

> "The dog bite healed but he continues to experience malaise, dizziness, headaches and shooting pains into his left leg. He was given physical therapy in the industrial lab clinic every other day, but he did not improve.
>
> "Mr. Petrylak has had several investigations and work ups to find out the nature of his fever of unknown origin and dizziness, however, all of that so far has proved negative. I still have to assume that somehow his symptoms are related to the dog bite since chronologically at least he was completely asymptomatic previously and has had a physical previously which was reported as normal. Viral studies have not been

> done except for Hepatitis and Mononucleosis which were negative.
>
> "Currently he still runs a low grade temp at 99.7, however, his dizziness, headaches and generalized weakness has improved dramatically. He only has some shooting pain in the left leg occasionally."

In an August 30, 1984 report Dr. Geralt stated that appellant's leg wound did not look infected when he was seen on May 29, 1984.

An Office of Workers' Compensation Programs medical adviser reviewed the medical evidence on October 10, 1984 and stated:

> "In my opinion there is no continuing problem as a residual at present from the dog bite. The report of July 6, 1984 would be adequate time for a non-infected bite to have healed. Patient had two superficial lacerations. My impression is that the ongoing temperature elevation, dizziness, headaches, weakness, etc. are personal and not related to the dog bite or sequelae."

In a January 14, 1985 report Dr. Donald L. Newman, a Board-certified family practitioner, stated that appellant's fever had resolved by the time he last saw Dr. Ibrahim in October 1984, that he now had pain in his left leg which was worse with standing or walking one block, that on examination he had a scar, tenderness and swelling of the left leg, and that thermography indicated a chronic painful condition of the left lower leg. Dr. Newman concluded:

> "Based on history, physical examination, x-ray and blood and thermographic studies, this patient demonstrates the following diagnoses: 1. Residuals of dog bite to left lower extremity, with pain, numbness and swelling. 2. Traumatic anxiety state. 3. History of fever of unknown origin, probably secondary to #1.
>
> "*DISPOSITION:*
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> "Due to the leg problems, this patient remains limited in walking, standing, climbing, squatting, standing and in general weight bearing on the leg. He should be followed closely over the next 20 to 30 years, for the consequences of a slow virus infection and its attack on the central nervous system. Apparently, the fever of unknown origin remains unknown, and thus he should be observed over the years, for the consequences of

> pathogens, either viral or bacterial, that were transferred to him, at the time of the dog bite."

On March 8, 1985 the Office referred appellant, the case record and statement of accepted facts to Dr. Enrique Signori, who is Board-certified in hematology and medical oncology, for an evaluation of his condition and its relation to his employment injury. In an April 18, 1985 report Dr. Signori, after setting forth appellant's history and findings on physical examination and blood studies, stated:

> "Based on the information presently available to me, I must conclude that there is no evidence of any hematogical disorder at this time. In fact, Mr. Petrylak has a normal physical examination and a complete normal examination of his blood. Further, nothing is derived from my examination or review of the data available that will reflect any abnormality in his blood resulting from the previous dog bite. He presents with minimally abnormal liver functions and although they will deserve additional follow up in the future, they do not appear to be causing any disability."

In response to an Office request for a report specifically addressing the issue of appellant's disability from June 9 to September 14, 1984 Dr. Signori stated in a May 21, 1985 report:

> "I did not, as you know, examine Mr. Petrylak during the interval of June 9, 1984 until September 14, 1984, but based on all the information available to me today, I must again conclude that there is no evidence whatsoever of any hematological abnormality which may have been caused by his dog bite.
>
> "In the additional material you have sent me, I find only conjectural opinions but no factual information to substantiate a causative relationship between this patient's dog bite and the symptoms of dizziness, headaches and malaise. While it is easy to associate the local findings of the left lower leg at the time as being a consequence of the dog bite, there really is not any quantum of evidence supporting the association of the symptoms with the same episode.
>
> "Dog bites, of course, have been associated with rabies, but this is an acute viral disease characterized by a central nervous system irritation usually terminating in paralysis and death. Mr. Petrylaks' problems in no way resemble those resulting from infection with the rabies virus.

> "In relation to a slow virus infection which has been described and is usually slow in development, and progress over a period of time, there has never been any demonstration of any relationship with a dog bite as vector in the transmission of this type of infection."

By a compensation order dated July 5, 1985 the Office denied appellant's claim for compensation and medical benefits after June 8, 1984 on the basis that the weight of the medical opinion evidence showed that his disability after this date was not due to his May 26, 1984 dog bite.

Appellant requested a hearing which was held on July 31, 1985. By a decision dated and made final on March 17, 1986 an Office hearing representative found that the evidence was not sufficiently definitive or persuasive in establishing that there was a cause and effect relationship between appellant's laceration and his subsequent symptomatology and disability, and that the report of Dr. Signori constituted the weight of the medical evidence as the report of an impartial medical specialist resolving a conflict of medical opinion.

On appeal appellant's attorney contends that the reports of the Troy Industrial Medical Center after May 29, 1984 should not be considered because appellant was directed to report to this facility by the employing establishment despite his protests and contrary to its regulations on an injured employee's choice of physicians, that appellant's continuation of pay should not have been terminated on June 8, 1984 because there was no evidence in the record at that time that his employment-related disability had ceased (citing *Michael C. Kolosey*, 8 ECAB 549 (1956)), that there was no conflict of medical opinion at the time of the Office's referral to Dr. Signori as the Office medical adviser's opinion was speculative and unsupported by rationale, that even if the Board were to find a conflict, Dr. Signori's reports were insufficient to resolve it, and that the Board should look at the "common sense of the situation" and find that appellant's illness and disability until September 14, 1984 were causally related to his May 26, 1984 dog bite.

The Board finds that appellant's disability after June 8, 1984 is not causally related to the dog bite he sustained on May 26, 1984.

According to Dr. Geralt, who examined appellant on the date of his injury, the dog bite resulted in a superficial laceration to his leg with contusion and ecchymosis. In accordance with Dr. Geralt's recommendation, appellant returned to light duty on his next scheduled work day after the May 26, 1984 dog bite. Appellant stopped work on May 31, 1984 because he was feeling ill. Dr. Geralt indicated appellant was totally disabled from June 1 to 8, 1984, and stated that on examination on June 8, 1984 the dog bite "appeared to be healing satisfactorily." On June 8, 1984 Dr. Geralt discharged appellant from his care and referred him to his own doctor, Dr. Ibrahim, for follow-up treatment. This referral was not for treatment of the bitten leg, but rather for his complaints of headaches and fever, symptoms which Dr. Geralt stated "did not appear to be due to the dog bite."

In his initial report dated June 27, 1984 Dr. Ibrahim noted appellant had fever of unknown origin, dizziness, and generalized weakness, but stated that the causative factor had not been determined. In a July 6, 1984 report Dr. Ibrahim stated that investigations and workups to discern the nature of his fever of unknown origin and dizziness had proved negative. Dr. Ibrahim's statement in this report that "I still have to assume that somehow his symptoms are related to the dog bite since chronologically at least he was completely asymptomatic previously and has had a physical previously which was reported as normal" is insufficient to establish causal relation because it is speculative.[1] In addition, an opinion that a condition is causally related to an employment injury because the employee was asymptomatic before the injury is insufficient, without supporting rationale, to establish causal relation.[2]

An Office medical adviser concluded that appellant's fever, dizziness, headaches, and weakness were personal and not related to the dog bite. The Office referred appellant to Dr. Signori, who is Board-certified in hematology and medical oncology, for an opinion on the relation between his dog bite and his disability from June 9 to September 14, 1984. Dr. Signori concluded, based on his review of the medical evidence, that there was no evidence to support the association of the symptoms of dizziness, headaches and malaise with dog bite, that appellant's problems did not resemble those resulting from infection with rabies virus, and that "there has never" been any demonstration of any relationship with a dog bite as vector in the transmission of a slow virus infection which progresses over time.

Dr. Newman also stated that the origin of appellant's fever remained unknown. Although Dr. Newman stated in his January 14, 1985 report that appellant had leg problems resulting in limitations for work as residuals of his May 26, 1984 dog bite, these leg

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[1] *See Charles A. Massenzo*, 30 ECAB 844 (1979).

[2] *John W. William*, Docket No. 86-1889 (issued April 13, 1987); *Robert Baer*, Docket No. 86-1372 (issued February 24, 1987).

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problems in January 1985 point to recurrence of disability in January 1985 or a possible permanent impairment of appellant's leg, questions which are not before the Board on this appeal. Dr. Newman's report lends no support to appellant's claim for compensation for the period from June 9, 1984 to September 14, 1984.

The decision of the Office of Workers' Compensation Programs dated March 17, 1986 is affirmed.

In the Matter of MARK A. WAGES *and* U.S. POSTAL SERVICE, POST OFFICE, Memphis, Tenn.

Docket No. 87-1860; Submitted on the Record;
Issued December 18, 1987

Before MICHAEL J. WALSH, GEORGE E. RIVERS, WILLIE T.C. THOMAS

The issue is whether the schedule award to appellant in the amount of $1,500.00 for facial disfigurement was proper and equitable.

On June 3, 1982, appellant, then a 31-year-old letter carrier, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that he sustained injuries to his head and face when his postal vehicle was involved in a collision with two other vehicles on that same date. Appellant stopped work on June 3, 1982 and returned to work on June 21, 1982.

In support of his claim, appellant submitted the July 7, 1982 attending physician's report of Dr. Robert C. McEwan, a Board-certified family practitioner, who examined appellant on the date of the accident and diagnosed mild concussion, multiple contusions, abrasions, lacerations in the facial area and posterior muscle spasms as a result of the June 3, 1982 employment incident. Appellant also submitted the June 3, 1982 medical report of Dr. Thomas L. Holliday, a plastic surgeon, who stated that he performed surgery on appellant on June 3, 1982 for repair of "lacerations of the right posterior scalp, right face and right upper and lower lip and chin."

The Office of Workers' Compensation Programs accepted that appellant sustained multiple lacerations to his face and head as a result of the June 3, 1982 employment injury. Appellant received compensation in the form of continuation of pay for the period June 4, 1982 to June 20, 1982 and payment of, or reimbursement for, medical services rendered.

On December 6, 1985 appellant filed a claim for compensation on account of traumatic injury (Form CA-7) seeking a schedule award for his scalp and facial disfigurement resulting from his June 3, 1982 employment injury.[1]

In support of his claim for a schedule award, appellant submitted the December 13, 1985 attending physician's report of Dr. McEwan and the doctor's accompanying narrative report also dated December 13, 1985. In his narrative report, Dr. McEwan stated, in relevant part, as follows:

> "* * * [Appellant] had multiple injuries from [the June 3, 1982 employment injury] and I recently saw him on December 6, 1985. He still has a problem with some scarring on his face and also in his scalp. The patient sustained a 2½ inch transverse laceration extending from the corner of the right side of his mouth and obliquely to his right ear. He also has a laceration of the right ear lobe which is still healing. He has a laceration which continues to heal in the right temporal area of his scalp. He has two or three more lacerations on his scalp which are covered by his hair line. The most prominent scars are the ones described on his face. The one beginning at the corner of the right side of his mouth has a small cyst in the center of the suture line. The patient is being seen by Dr. Thomas Holliday on a periodic basis. [Appellant] also suffered a few puncture wounds to the area of the right elbow. These have scarred in and the scars are still visible, but except for appearance they do not give him any trouble. In December, 1984, I drained a stitch abscess on the patient's right cheek which was secondary to the laceration of the above-mentioned accident, and several times I have cared for the healing process of these lacerations as has Dr. Holliday.
>
> "[Appellant] suffered a brain concussion in this accident, but his facial lacerations and the permanent scarring which he has, seem, at the present time, to be his main problem. I feel that [appellant] has reached probable optimum healing. It is possible, however, in the future he might have some type of

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[1] The record indicates that prior to filing his December 5, 1985 claim for a schedule award, appellant filed, on May 18, 1984, a recurrence of disability claim (Form CA-2a) alleging that on or about April 11, 1984, he felt a tingling sensation on the top right part of his head which he alleged was a residual effect of his June 3, 1982 employment injury. Appellant stopped work on May 7, 1984 and returned to work on May 15, 1984. In support of his claim, appellant submitted the May 14, 1984 medical report of Dr. Dowen E. Snyder, a Board-certified neurosurgeon. A final decision on this claim has not been rendered by the Office and accordingly, it is not subject for review by the Board. *See* 20 C.F.R. section 501.2(c).

> plastic revision or some type of further surgery if he continues to have trouble with this scarring on his face and in his scalp."

By letter dated January 27, 1986 the Office requested Dr. McEwan to render an opinion as to whether plastic surgery would offer a reasonable prospect of material improvement of appellant's disfigurement. By written response dated February 2, 1986, Dr. McEwan stated that he believed appellant's scarring would be lessened by plastic surgery.

By letter dated May 2, 1986, the Office forwarded to appellant an application for disfigurement award accompanied by an attending physician's questionnaire which the Office requested appellant and his physician complete and return with two photographs of the disfigurement. The requested material was returned to the Office on a timely basis. In response to the question on the application for disfigurement award as to why he believed that his disfigurement would likely handicap him in securing or maintaining employment, appellant stated that "[my] scalp is very tender and sensitive when touched and has made me nervous when anything gets close to the right side of my head."

By letter dated August 15, 1986, the Office referred appellant for examination and evaluation by Dr. Colin Clarendon, a Board-certified plastic surgeon, and submitted to the doctor appellant's medical file, together with a statement of accepted facts.

Dr. Clarendon examined appellant on August 27, 1986 and in a report dated September 10, 1986 set forth his findings and evaluation as follows:

> "There was a two-inch laceration scar in the right scalp which was hidden by the hair. There was a one-inch transverse scar above the left upper lip; there was a one-inch oblique scar below the right lower lip and another scar below that on the chin approximately one inch long. These scars have healed fairly well and are flat. The patient does have an indented irregular V-shaped scar approximately 3½ inches long on the right cheek. This runs transversely lateral to the corner of the mouth, and is in an area where there are no normal facial creases, thus it is noticeable. It is also more noticeable in different light than at all times, depending on how the shadow is accentuated. Also there is a small raised scar on the right elbow.
>
> "The patient could have improvement of the indented scar of the right cheek. This might possibly remove the indentation,

> but would not change the direction of the scar, and it would still remain visible. All of the scars are permanent. A straight line excision of the scar with a revision would be the easiest procedure to do. A running W excision of the scar would break up the scar into several components that would be in the direction of the skin creases when the patient smiled, but at rest these scars would be more noticeable. I would not advise doing this type of scar revision. The scar on the elbow which is small would be improved by a scar revision.
>
> "* * * He would, in my opinion, obtain some improvement, but his scar would still remain permanent. The maximum amount of improvement to be gained from the scar revision of this type would be noticeable approximately within six months. The patient might still need a second scar revision, depending on how the area healed, but it would not be possible to predict this until a first procedure had been done.
>
> "The patient has approximately a ten to 15 percent cosmetic disability to his face as a result of this injury."

Following appellant's examination by Dr. Clarendon, the Office medical adviser reviewed appellant's case record and in a report dated October 20, 1986 stated that he approved and authorized further surgery for appellant, subject to appellant's agreement, and in the event appellant declined further surgery, he noted that appellant must be interviewed and evaluated by the District Director in accordance with Office's established procedures [2] before a decision could be made on appellant's application for a schedule award.

The Office subsequently contacted Dr. Clarendon and informed him that authorization for scar revision surgery for appellant had been approved. By letter dated December 17, 1986, Dr. Clarendon notified the Office that he had discussed the scar revision surgery with appellant and appellant declined to undergo further surgery.

On or about April 27, 1987, the District Director met with appellant and filed the following report dated May 1, 1987:

> "[Appellant] visited our office for the purpose of evaluating his facial disfigurement.
>
> "I observed [appellant] at a distance of approximately six feet (across my desk) and at a distance of approximately 15 feet, (across my office), under both artificial and natural light-

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[2] See Federal (FECA) Procedure Manual Chapter 2-808.6e which provides in relevant part that if the District medical adviser, in a disfigurement claim, finds maximum improvement has occurred, the claimant will be personally interviewed and observed by the [Office's] Chief of Claims or District Director.

> ing. I found some scarring of both ears, but the most prominent scar is from the right edge of his mouth back toward his right ear. The scar is indented and is more noticeable in natural light than in artificial light.
>
> "The scar is noticeable at both six feet and 15 feet distances. The medical evidence in file shows that some surgery may diminish the scar, but would not eliminate it and [appellant] has declined the surgery. I must agree with [appellant] that further revision of the scar without any elimination of [the scar] is not worth undergoing further surgery. I find the scar to be of a permanent nature. I also find the scar to be of a nature which would likely handicap an employee in securing and maintaining employment.
>
> "On the basis of the evidence of record and personal observation, it is my judgment that [appellant] is entitled to compensation in the amount of $1,500.00 in accordance with 5 U.S.C. section 8107(c)(21)."

By compensation order dated May 1, 1987, the Office awarded appellant the amount of $1,500.00 as proper and equitable compensation "for disfigurement of the face resulting from his injury of June 3, 1982, as provided by 5 U.S.C. section 8107(c)(21)."

The Board finds that the Office, in determining the amount of the schedule award at $1500.00 for facial disfigurement in the present case, did not abuse its discretion.

The Federal Employees' Compensation Act [3] provides in section 8107(c)(21) that "for serious disfigurement of the face, head, or neck of a character likely to handicap an individual in securing or maintaining employment, proper and equitable compensation not to exceed $3,500.00 shall be awarded in addition to any other compensation payable under this schedule." [4]

In a case involving disfigurement, the question before the Board is whether the amount awarded by the Office was based upon sound and considered judgment and was "proper and equitable" under the circumstances as provided by section 8107(c)(21) of the Act.[5] In determining what constitutes "proper and equitable compensation" for disfigurement, sound judgment and equitable evaluation must be exercised as to the likely economic effect of appellant's disfigurement in securing and maintaining employment.[6]

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[3] 5 U.S.C. section 8101 *et seq.*

[4] 5 U.S.C. section 8107(c)(21).

[5] *Ada Fauntleroy*, 26 ECAB 406 (1975); *Antonio J. Cuccia*, 27 ECAB 190 (1975).

[6] *Antonio J. Cuccia*, *supra* note 5.

The Board has recognized that the Office deputy commissioner, assistant deputy commissioner, the Chief of Branch of Claims, the District Director or similar officials because of their experience, have the status of experts in evaluating disfigurement for schedule award purposes so long as they personally view the disfigurement.[7]

The record shows that appellant was examined by Dr. Colin Clarendon, a Board-certified plastic surgeon, who described in detail appellant's facial scars in his report of September 10, 1986. The record also shows that an Office medical adviser then reviewed appellant's case record and the photographs of disfigurement submitted by appellant and an Office District Director personally observed and interviewed appellant. The May 1, 1987 report filed by the District Director shows that he took into consideration the proper factors and circumstances in calculating the award and that he exercised sound judgment in reaching his conclusions. The Office, in granting appellant a schedule award in the amount of $1,500.00 based on the findings and recommendations of the Office District Director, did not abuse its discretion.

Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, actions taken which are contrary to both logic and probable deductions from established facts and similar criteria. The Board will not interfere with or set aside a disfigurement determination of the Office unless it is clearly in error. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual result.[8] The Board finds that there is no evidence in the record to establish that the Office abused its discretion in its determination of the amount of appellant's schedule award.

Appellant contends on appeal that the Office did not take into consideration the scars hidden by his hair.

The Board finds that the Office was correct not to take these scars into consideration in determining the amount of the schedule award. Appellant's scars hidden by his hair, by the very fact that they are hidden by his hair, as admitted by appellant and confirmed by Dr. Robert C. McEwan in his December 13, 1985 report and by Dr. Clarendon in his September 10, 1986 medical report, do not constitute facial disfigurement.[9]

Appellant further contends on appeal that the June 3, 1982 employment injury resulted in permanent nerve damage in his facial area and this was not given consideration by the Office in the determination of his schedule award.[10]

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[7] *Alfred T. Baldwin*, 30 ECAB 734 (1979).

[8] *Nancy Karn*, 1 ECAB 78 (1947).

[9] *See* 5 U.S.C. section 8107(c) and also American Medical Association's *Guides to the Evaluation of Permanent Impairment*, page 159 (2nd ed. 1984). *See also William Mayola*, 15 ECAB 337 (1964).

The Board finds that appellant is not entitled to a schedule award for his claimed nerve damage in the facial area.

The Board has repeatedly held that a schedule award is not payable for the loss, or loss of use, of a part of the body or function not specifically enumerated in the Act.[11] The Board has held that this principle applies equally to body members which are not enumerated in the schedule provision as it read before the 1974 amendment and to organs which are not enumerated in the regulations[12] promulgated pursuant to the 1974 amendment.[13] Since the nerve is not a body part specifically enumerated in either the Act or the regulations promulgated thereunder, there is no schedule award available in this case. Additionally, there are no provisions in the Federal Employees' Compensation Act for an award of compensation on the basis of nondisabling pain, suffering or other physical discomfort or distress.[14]

The decision of the Office of Workers' Compensation Programs dated May 1, 1987 is affirmed.

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[10] Appellant filed a claim on account of traumatic injury (Form CA-7) dated June 28, 1987 seeking a schedule award based on permanent disability. By letter dated July 17, 1987, the Office notified appellant that because a schedule award had already been granted, his appropriate course of action, if he believed he was entitled to a greater award was to pursue one of the appeal rights provided with the Office's decision of May 1, 1987.

[11] *See Thomas E. Montgomery*, 28 ECAB 294 (1977).

[12] *Clarence Faison*, 26 ECAB 375 (1975).

[13] 88 Stat. 1143 section 4; 5 U.S.C. section 8107(c).

[14] *See Dominic Meli*, 15 ECAB 185 (1963). If appellant is alleging disability for work due to nerve damage then the appropriate course of action is to file a claim for compensation on the basis of total or partial disability and submit supporting medical evidence. The record indicates that appellant filed a recurrence of disability claim (Form CA-2a) on February 5, 1987 alleging that on February 2, 1986, he experienced a tingling sensation on the right side of his scalp and irritation in his right arm as residual effects of his June 3, 1982 employment injury, and submitted a June 16, 1987 medical report of Dr. McEwan, in support of his claim. However, no final decision has been rendered by the Office on this claim and, therefore, pursuant to 20 C.F.R. section 501.2(c), it is not subject for review by the Board.

In the Matter of DONALD M. PARKER *and* DEPARTMENT OF THE NAVY, NAVAL AIR STATION, Jacksonville, Fla.

Docket No. 87-1922; Submitted on the Record;
Issued December 21, 1987

Before GEORGE E. RIVERS, DAVID S. GERSON, MICHELE VON KELSCH

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective August 14, 1987 on the ground that he refused an offer of suitable work.

On August 27, 1979 appellant, then a 37-year-old warehouseman, sustained a cervical strain and herniated nucleus pulposus at C5-C6 while "disassembling wooden bins with a crowbar." He was absent from work intermittently thereafter, and has not returned to work since April 1980. He retired on disability effective July 28, 1980. The Office of Workers' Compensation Programs accepted appellant's claim, and began payment of compensation.

In a report, based on an examination on March 21, 1985, Dr. Karl M. Davidson, a Board-certified orthopedic surgeon, indicated:

> "I reviewed the findings of some of the examining physicians around the time . . . of the surgery for the herniated disc and . . . some examinations since that time, [and the] patient appears to slowly have normalized the deep tendon reflex of the right biceps and right radials."
>
> * * *
>
> "* * * He states . . . he occasionally does volunteer work . . . He states he goes out to old people's houses and cooks meals for them. He states he also volunteers at some type of thrift shop . . . Patient states he is able to ride a bicycle around town; he takes care of himself now and does his activities of daily living; he is able to walk around. He is able to be up half an hour to one hour at a time walking, this has to be followed by a period of about a half hour sitting, at which point he again has to get up and walk around. * * * Patient states he does drive a car. He can drive about fifty miles and then has to get out and walk around for a while. * * * He gets stiff if he overexerts himself. He states last Sunday he

> worked in his yard too long, the neck was stiff the next day. He does not describe any swelling of the right arm now and does not describe any specific area of hypesthesia or paresthesia . . . such as the sensory changes which were constant in the fourth and fifth fingers in the 1979 period. * * * Patient is not doing any physical therapy now, such as neck flexion exercises or hot and cold packs, etc. * * *"

* * *

> "EXAM: [The doctor discussed in detail his findings on physical and x-ray examinations.]"

* * *

> "Patient can perform light work at this time. It would have to be a type of work where he is able to get up and move about and also sit down . . . as he feels he needs to, within the limits of his neck and right upper extremity symptoms . . . This would not be any type of heavy work. It cannot involve bending, squatting stooping, pushing, pulling, carrying or lifting heavy objects. * * * The patient could do some type of work along the line which he is desirous of, . . . such as dealing with the public, low level management jobs, jobs involving some desk work and some periods when he is up on his feet talking, etc."

In a report dated February 12, 1986 Dr. Harold L. Norman, a Board-certified orthopedic surgeon, indicated that appellant "[m]ay return to light work with restrictions as indicated on the work restriction evaluation." The work restriction evaluation form indicated that appellant could work eight hours a day; that he could lift up to 10-20 pounds; that he was able to sit, walk, lift, bend, squat, climb, kneel, twist and stand intermittently for one or more hours a day; but that his neuropsychiatric condition had not been evaluated.

In a report dated November 17, 1986 Dr. Marlin C. Moore, a Board-certified psychiatrist, reviewed appellant's history, and stated:

> "[Appellant] claims that his emotions affect his shoulder, neck and arm pains. Currently, he is in poor mental health, having

> trouble both within himself and in his outward behavior.[1] These emotional problems are serious, and they can be expected to keep troubling him indefinitely. He makes sufficient use of the mechanism of repression to be hysterical; when a situation puts pressure on him, he becomes helpless; he then magnifies his aches and pains to the point of believing that he is sick or disabled, in this way, he is likely to keep complaining and making demands to force people to take care of him. * * *
>
> "In my opinion, [he] has had a personality disorder all his life. * * * He is not a candidate for intensive psychotherapy of the kind that aims at self-understanding, but periodically when under stress he may need supportive psychiatric help. I feel his disability now should be based on his physical condition and not his personality disorder."

In an accompanying neuropsychological assessment, dated October 20, 1986, Susana P. Urbina, Ph.D., indicated that appellant had a high school education, and stated:

> "* * * [Appellant] contends that because of the severe headaches he had for two years after his injury, he became addicted to various pain medications which he used to 'chase' with alcoholic beverages. [He] reports that in 1982 he went through a 28-day in-patient rehabilitation program for substance abuse. However, he subsequently became addicted to cocaine and went through a second rehabilitation program in 1983. [He] claims that he discontinued 'serious' drug abuse about a year ago and that for the past six months he has been totally 'drug free.' He does admit to drinking, between four and five drinks, on weekend social occasions. * * *
>
> "* * * He added that he tries to have a set routine to occupy his days and 'keep from going crazy.' [He] said he spends his time cleaning his apartment and cooking for neighbors, . . . he also takes walks, rides a bike and lies in the sun. * * *
>
> "* * * He stated that part of the reason he started abusing drugs was the boredom he had to contend with after his untimely retirement. * * *
>
> "Test Results: [Appellant's] performance in the neuropsychological battery was well within normal limits for a person of his age and educational background in most of the areas assessed by the battery. * * *"

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[1] The record indicates that appellant served 60 days in jail in 1986 for "a couple of misdemeanors."

* * *

> "[His] MMPI [Minnesota Multiphasic Personality Inventory] profile suggests that he is currently experiencing a moderate level of depression, tenseness and anxiety. His profile is similar to those of individuals who harbor chronic feelings of inferiority and inadequacy. * * * [His] profile also suggests that he is extremely immature and self-centered, and that he has excessive somatic concerns and a passive orientation. * * * "

An Office medical adviser reviewed the medical evidence, and in a work restriction evaluation form dated December 16, 1986, indicated that appellant could work eight hours a day; that he could intermittently sit or walk up to six hours a day, lift (a maximum of 10-20 pounds), bend, squat, climb, kneel and twist up to one hour a day, and stand up to four hours a day; that he could not reach above the shoulder "in general" and not at all with his right arm; and that his interpersonal relations were not affected by a neuropsychiatric condition.

By letter dated January 12, 1987 the Office referred appellant to Dr. Robert D. Dehgan, an orthopedic surgeon, for an evaluation, requesting that the doctor submit a report as well as a completed work restriction evaluation form. Dr. Dehgan submitted his office notes from January 19 through August 19, 1987 describing his findings on examination and indicating that he had recommended physical therapy.[2] However, the doctor did not discuss appellant's capacity for work. Nor did he submit a completed work restriction evaluation form despite another request by the Office on June 5, 1987.

By letter dated April 24, 1987 the employing establishment offered appellant a position as a supply clerk, enclosing a job description which indicated:

> "Duties:
>
>> 'Sorts incoming mail and disburses to the [various] sections. Sorts outgoing mail.* * *
>>
>> 'Receives, sorts, files, and maintains completed receipt invoices on material received from or for storage and direct turnover.
>>
>> 'Researches completed files for proof of receipt invoices. . .

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[2] The Office subsequently authorized the physical therapy.

> 'Sorts and forwards . . . documents. . .
>
> 'Operates the CRT/Remote for inquiries on receipt documents. Operates a copy machine, collates material, folds, and stuffs envelopes.' "

* * *

> "Physical Demands: The work is mostly sedentary, and no special physical demands are required other than walking. The employee is free to move about during the course of assignments. Filing may be accomplished by either standing or sitting on a chair or stool. Occasional lifting not to exceed 20 pounds may be required.* * *"

Appellant indicated initially that he would accept the position, and underwent a fitness-for-duty physical examination on May 26, 1987 by Dr. John H. Baker of the employing establishment. In a report of the same date, Dr. Baker indicated that appellant was fit for duty in the proposed position, but only with certain permanent restrictions which may have to be expanded in the future, and that if appellant returned to work, reevaluations should occur every 60 days. In an attached form, the doctor indicated that appellant could not lift, carry, push or pull over five pounds; that he could not stand more than two hours per shift; that he could not walk more than one hour per shift; and that he should change his body position at least every 30 minutes.

The employing establishment modified the physical requirements of the supply clerk position, omitting the requirement that he may have to occasionally lift up to 20 pounds.

By letter dated June 16, 1987 the Office informed appellant:

> "We have reviewed [the] offer of employment, and have compared it with the medical evidence concerning your ability to work, and we have found the offer to be suitable.* * *"

* * *

> "If you refuse this employment . . . without reasonable cause, your compensation benefits . . . will be terminated. You will retain your entitlement to medical care. * * *"

By letter dated July 17, 1987 the employing establishment informed appellant that it would accommodate all of the additional restrictions recommended by Dr. Baker; that it would grant him pay retention; and that he should accept or refuse the offer by July 30, 1987.

Appellant informed the Office by telephone conversations on July 31 and August 4, 1987 that he would not accept the offered position because he felt it would be more advantageous financially to take the disability retirement benefits from the Office of Personnel Management and obtain a private sector job.

By compensation order dated August 14, 1987, incorporating by reference a memorandum to the Director, the Office terminated appellant's compensation effective that day on the ground that he had refused an offer of suitable work.

The Board finds that the Office of Workers' Compensation Programs properly terminated appellant's compensation effective August 14, 1987 on the ground that he refused an offer of suitable work.

Section 8106(c) of the Federal Employees' Compensation Act[3] provides in pertinent part, "A partially disabled employee who . . . (2) refuses or neglects to work after suitable work is offered . . . is not entitled to compensation."

In a work restriction evaluation form dated December 16, 1986, based on the reports of Drs. Davidson and Norman, Board-certified orthopedic surgeons, and Dr. Moore, a Board-certified psychiatrist, the Office medical adviser indicated that appellant was capable of working eight hours a day with certain physical restrictions, noting that appellant's interpersonal relations were not affected by a neuropsychiatric condition.

With regard to appellant's neuropsychiatric condition, Dr. Moore's report and the accompanying neuropsychological assessment report indicate that appellant has an emotional problem which may require periodic psychiatric help. However, the reports do not indicate that the emotional problems are of a type that would disrupt his interpersonal relations at work. In fact, the neuropsychological assessment report suggests that some of appellant's problems, such as his previous drug abuse, may have resulted from "the boredom he had to contend with after his untimely retirement," so that he may benefit from working. Also, Dr. Davidson related in his report that appellant had done volunteer work helping the elderly and working in a thrift shop after retiring on disability and that he was "desirous of" jobs dealing with the public. Thus, the medical reports do not indicate that appellant is incapacitated for work due to a neuropsychiatric condition.

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[3] 5 U.S.C. section 8106(c).

The employing establishment offered appellant a position which was consistent with the physical restrictions recommended by the doctors, including the additional restrictions recommended by Dr. Baker of the employing establishment. The Office determined that the position was suitable, and informed appellant of the consequences of refusing the offered position without reasonable cause. However, appellant declined the offer without reasonable cause: financial advantage is not a reasonable cause.[4] The Board finds that the supply clerk position offered by the employing establishment was suitable and that the Office properly terminated appellant's compensation based on his refusal to accept suitable work.

The decision of the Office of Workers' Compensation Programs dated August 14, 1987 is hereby affirmed.

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[4] *See* Federal (FECA) Procedure Manual, Chapter 2-813, section 6c, which provides a list of circumstances which may serve as "reasonable grounds."

In the Matter of GEORGE DEPASQUALE *and* U.S. POSTAL SERVICE, POST OFFICE, Worcester, Mass.

Docket No. 87-1282; Submitted on the Record;
Issued December 22, 1987

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether appellant has established that he sustained a recurrence of total disability on January 4, 1985.

On April 12, 1957 appellant, then a 30-year-old mail handler, filed a claim for an injury to his back sustained that day when picking up a heavy mail sack. Appellant missed work the following day and returned on April 14, 1957. His condition was diagnosed as a sprain of the upper lumbar region of his back.

On March 6, 1962 appellant, who then and thereafter was employed as a letter carrier, filed a claim for an injury to his left hip, back, left hand, and neck sustained that day when he slipped and fell on icy stairs. Appellant stopped work on the date of the injury and returned on March 19, 1962. His condition was diagnosed as a contusion of the head, a sprain of the left neck and shoulder and a sprain of the lower back.

On January 15, 1964 appellant filed a claim for an injury to his right elbow and right hip sustained on January 14, 1964 when he slipped and fell on ice. He did not miss time from work following this injury.

On February 11, 1964 appellant filed a claim for an injury to his right shoulder and the center part of his back sustained on that date when he slipped and fell on ice-covered stairs. Appellant stopped work on the date of the injury and returned on March 14, 1964. His condition was diagnosed as an acute sprain of the right shoulder and neck.

On January 31, 1966 appellant filed a claim for an injury to his right hip, right knee, and his lower back sustained on that date when he slipped and fell on snow-covered ice. He did not miss time from work following this injury. He was treated for a right knee injury, and a low back sprain was also diagnosed.

On September 7, 1966 appellant filed a claim for an injury to his hip, elbow and lower back sustained on that date when he turned his ankle on a stone and fell to the ground. Appellant stopped work on September 8, 1966 and apparently returned September 20, 1966. His condition was diagnosed as a contusion of the buttock musculature and a sprain of the muscles and ligaments of the lumbosacral spine.

On January 19, 1968 appellant filed a claim for an injury to the lower part of his back and his right hip sustained the previous day when he slipped and fell on ice. He lost no time from work following this injury. His condition was diagnosed as a contusion of the lower back and a sprain of the ligaments of the low back area.

On January 28, 1970 appellant filed a claim for an injury to his right hip and lower back sustained on that date when he slipped and fell on an icy patch in the road. Appellant stopped work on January 31, 1970 and returned on February 24, 1970. His condition was diagnosed as a sprain of the ligaments and muscles of the lumbosacral spine and a contusion of the right hip and buttock.

On December 11, 1970 appellant filed a claim for an injury to his right hand and his back sustained on the previous day when he slipped on ice and fell. He stopped work on December 12, 1970 and returned on December 15, 1970. His condition was diagnosed as a sprain of his right finger.

On February 5, 1975 appellant filed a claim for an injury to his left hip and his lower back and his left knee sustained on that date when he fell on an icy crossover. Appellant stopped work on February 5, 1975.

On February 6, 1975 appellant was examined by Dr. Roland R. Caron, an orthopedic surgeon, who stated that he had a low back sprain and a sprain of the left knee related to a fall on the ice on

February 5, 1975. In accordance with Dr. Caron's instructions, appellant returned to his regular work on April 14, 1975. Appellant received 45 days of continuation of pay, after which the Office of Workers' Compensation Programs paid him compensation for temporary total disability until he returned to work.

Appellant again stopped work on July 23, 1975 and filed a claim for compensation. In an August 7, 1975 report Dr. Caron diagnosed a chronic back condition, indicated this condition was related to appellant's February 5, 1975 injury, and stated that he could work but could not carry a mail bag. In an October 27, 1975 report Dr. Caron diagnosed early degenerative changes of the sacroiliac joints bilaterally and indicated this condition was related to his February 5, 1975 injury. In a December 9, 1975 report Dr. Caron diagnosed chronic low back strain and chronic degenerative arthritis of the sacroiliac joint on the left side, indicated this condition was related to his February 5, 1975 injury, and stated that he was "totally and permanently disabled from returning to the work he was doing before."

The Office resumed payment of compensation for temporary total disability.

Appellant's disability retirement was effective on March 8, 1976 and was based on his inability to perform his duties due to his physical condition and the unavailability of light work.

On June 28, 1978 the Office referred appellant to Dr. Leo S. Buckley, a Board-certified orthopedic surgeon, for an evaluation of his condition and its relation to his employment. In an August 18, 1978 report Dr. Buckley diagnosed "a degenerative low back condition and possibly degenerative medial compartments and patella-femoral compartments in the right knee," and stated that he did not expect appellant to improve to the point of returning to work resembling his old duties but that he probably could do some sedentary work.

In a June 22, 1979 report Dr. Caron stated that appellant's condition was unchanged and that he had lumbosacral pain with instability and bursitis to both hips and arthritis to his low back area. In a January 29, 1980 report Dr. Caron stated that appellant was totally disabled by chronic low back decompensation with arthritis.

On November 15, 1981 the Office referred appellant to Dr. John Bianchi, a Board-certified orthopedic surgeon, for an evaluation of his condition and its relation to his employment. In a January 5, 1982 report Dr. Bianchi concluded that appellant was "disabled by reason of degenerative low back condition and degenerative changes in the medial and patello femoral compartments of his right knee. I feel that he is totally and permanently disabled from any and all gainful occupation and that prognosis for any significant functional recovery in this instance is nil."

On January 14, 1983 the Office referred appellant, the case record and a statement of accepted facts to a panel of physicians at the Boston City Hospital for an evaluation of his condition and its relation to his employment.

This panel submitted a report dated April 26, 1983 which was signed by Dr. Howard McIntyre, a neurologist, Dr. Robert Y. Pick, a Board-certified orthopedic surgeon, and Dr. Jonathan P. Strang, a Board-certified psychiatrist. In this report the panel set forth appellant's history, complaints, and findings on examination, and concluded:

> "Diagnosis: Work Related
>
> > "(1) Low back strain and left knee contusion with strain in 1975 now resolved
>
> "Non Work Related
>
> > "(1) Subjective complaints of multiple musculoskeletal pains in conjunction with degenerative osteoarthritic changes of the lumbosacral spine on x-ray.
> >
> > "(2) Genu varum bilaterally with mild degenerative changes in the medial compartments of the knees bilaterally
>
> "Comment: The back strain and knee sprain are considered by the panel to represent self-limited conditions which should have resolved within 4 to 6 months time at most. The non-work-related degenerative osteoarthritis is a degenerative condition which can be considered to have been aggravated by his multiple injuries leading to multiple pains which for practical purposes impose certain limitations on his physical activities. These limitations have been taken into consideration in filling out the work evaluation questionnaire. The panel feels that the patient's condition should have recovered sufficiently for him to return to full 8 hour day work activity. In view of the degenerative osteoarthritis the panel recommends that restriction from physical exertion, bending, lifting and prolonged immobilization should be adhered to in the work place according to the outline in the work qualification questionnaire completed with this examination."

The panel's report was accompanied by a work tolerance limitations form completed on March 1, 1983 by Dr. Pick, indicating appellant could sit, walk or stand intermittently eight hours, and lift zero to ten pounds.

By a decision dated November 2, 1983 the Office reduced appellant's compensation effective December 29, 1983 based on a finding that he had a wage-earning capacity represented by the position of general office clerk.

On November 4, 1983 the employing establishment made appellant an offer of reemployment as a manual distribution clerk with limitations against lifting over 10 pounds, bending, climbing, squatting, kneeling or twisting, and allowing the option to alternate between sitting and standing. The employing establishment submitted a copy of this job description to Dr. Caron who stated in a November 11, 1983 report that appellant was "capable of performing the work as described with the specific limitations regarding lifting, sitting, standing, bending, squatting, climbing, kneeling, twisting etc. I feel that the job of manual distribution clerk is medically within his capabilities."

Appellant accepted the employing establishment's offer and began performing the duties described on December 10, 1983.

In a June 20, 1984 report Dr. F. Joseph Celona, a Board-certified internist, diagnosed a chronic back strain and discomfort by history and a small Baker's cyst of the right knee, and stated that appellant was somatizing his complaints and that his most disabling condition was his emotional instability.

In a June 6, 1984 note Dr. Caron stated that appellant told him he was unable to sit, described his findings on examination, and concluded that "his status is virtually unchanged and his work status, consequently, is not to be changed either."

On July 9, 1984 appellant filed a claim for compensation on the basis that he had been unable to work eight hours per day since returning to work on December 10, 1983; he claimed compensation for the hours fewer than eight per day he had worked. The employing establishment indicated on August 7, 1984 that appellant "has not worked a full eight hour day of limited duty since his return to work."

In response to an Office August 15, 1984 letter advising him that the evidence did not show he could not work eight hours, appellant submitted a September 20, 1984 report from Dr. Mario Moretti, a general practitioner, stating that due to employment injuries in 1972 and 1975 appellant was "totally and permanently disabled from any and all gainful employment, and that his diagnosis was post-traumatic and degenerative arthritis of the low back and right knee." Appellant also submitted an August 28, 1984 report from Dr. Bianchi stating that appellant was "totally permanently disabled from any and all gainful occupations by reason of post-traumatic and degenerative arthritis involving his lower back and his right knee."

Appellant stopped work on January 4, 1985 and filed a claim for a recurrence of disability.

In a January 4, 1985 report Dr. Moretti stated that appellant was disabled beginning January 4, 1985 by recurrent increased low back pain and paravertebral muscle spasm and limited back motion; the doctor diagnosed "actual lumbosacral spasm" due to injury. In a February 5, 1985 report submitted in response to an Office request for an opinion why he believed appellant was totally disabled based on the conditions accepted by the Office, Dr. Bianchi stated that appellant was "totally disabled from any and all gainful occupations by reason of the arthritic conditions in his lower back and left knee but also the fact that these conditions have not improved over a very long period of time."

By a compensation order dated March 22, 1985 the Office found that appellant had not met his burden of proof for a recurrence of disability.

Appellant requested reconsideration and submitted additional medical evidence. In an April 5, 1985 report Dr. Moretti stated that appellant was complaining of severe pain and spasm over the low back when seen on January 4, 1985 and "I found him to be in extreme pain and spasm of the lumbosacral region due to post-traumatic and degenerative arthritis of the low back secondary to a 1975 accident at work, in which the patient fell down a flight of stairs." In an April 26, 1985 report Dr. Caron, who first examined appellant on January 18, 1985 after he stopped work on January 4, 1985, stated:

> "It is my opinion at this time that this patient's condition has not improved over the years even with aggressive treatment. Up to last year I felt the patient was capable of doing sedentary type work and he should be back to work and work as long as possible.
>
> "At present I see the patient's condition as somewhat deteriorated and would have to classify him now as totally and permanently disabled.

By a compensation order dated September 6, 1985 the Office found the additional evidence was not sufficient to warrant modification of its prior decision.

Appellant requested reconsideration and submitted an October 10, 1985 report from Dr. Caron based on an examination that day. Dr. Caron stated:

> "On April 26, 1985 I dictated a letter to you stating that I felt the patient's present condition had deteriorated somewhat over his previous visit and he would be classified at that time as totally and permanently disabled. I had classified the patient as having a condition of chronic low back instability for some time and as of 1984, I felt the patient was capable of some sedentary type work. However, his deterioration of his condition led me to the opinion that he should be given a full disability.
>
> "In an effort to clarify the cause of his problems, review of my records shows that the patient had a preexisting condition which was related to his post office activities in 1982 which were preexisting prior to his 1980 motor vehicle accident. This preexisting back condition had given him arthritic changes and these were markedly worsened by his motor vehicle accident in September 1980. The motor vehicle accident was an additional insult to his lower back but the results were made far worse by his preexisting condition.
>
> "I reiterate today that the patient has still deteriorated, is still having pain and problems, and I would have to classify him once again as totally and permanently disabled. Please note that all conservative measures to resolve his back problems have failed, and I feel that this patient has reached an end point."

In an October 31, 1985 report Dr. Caron stated "as an addendum to my report of October 10, 1985, I failed to state the patient's present disability is directly related to his injury at work on February 5, 1975."

In a December 13, 1984 report Dr. Bianchi stated that appellant fell down a flight of stairs as a result of his knee giving way in 1975 injuring his lower back, that he had pain and disability as a result of post-traumatic arthritis of the back and right knee, and that he was totally and permanently disabled from all gainful occupations by his post-traumatic and degenerative arthritis involving his lower back and his right knee.

By a compensation order dated July 7, 1986 the Office found that the additional evidence was not sufficient to warrant modification of its prior decisions.

In a July 9, 1986 letter appellant stated that in his February 5, 1975 employment injury he tumbled or stumbled down stairs to the sidewalk, that at the bottom of the stairs he slipped on ice under the snow, that he went into the air and landed on his back, that he had pain in his legs and back, and that he had not previously reported his knee giving way because he believed that the slip on the ice is what caused the injury.

In a July 22, 1986 report Dr. Caron stated that appellant still had knee problems but that his back had further deteriorated, and described a 1972 injury where appellant was pinned against a dock by a mail truck injuring his knee and lower back and a 1975 injury where appellant fell down a flight of stairs injuring his left knee and his back. Dr. Caron stated:

> "I mentioned in one of my reports that the patient had a motor vehicle accident on September 9, 1980 and it is important to note that the patient had x-rays taken in December of 1980 only three months after the accident which showed narrowing of the disc spaces in his lower back and arthritic changes. These changes take many months to show up and I do not feel they were related to the motor vehicle accident. The accident aggravated his preexisting condition, but I feel that his back problems and his degenerative changes in his x-rays were caused by his injuries at work in 1972 and again in 1975. I mentioned the motor vehicle accident in 1980 only in terms of completing his history but it was not a causative factor in beginning his back problems.
>
> "Although the patient did return to work after these problems, his attendance record at work was spotty due to his orthopedic troubles.
>
> "As far back as 1978, I felt that the patient was suffering from chronic lumbosacral decompensation and his prognosis was looking rather dim. The only treatment that has given the patient any relief in recent years has been the introduction of a new antiinflammatory drug, Orudis, which has enabled the patient to get more sleep and has given him some relief of his inflammation. However, it is quite relevant that the patient has not improved to the point where he is any better off in terms of his disability.

> "His last visit of May 23, 1986 showed that the patient still had persistent problems with point tenderness in the lower back, loss of approximately 25% of the range of motion of his spine and the patient was not able to stoop or bend forward without discomfort to the lower back. Although the patient does not have any evidence of neurological problems or radiculopathy extending down into the legs, I feel that his localized back problems, as evidenced by radiographs and his clinical examination, show that he has persistent and progressive degenerative joint disease of his lower spine with narrowing of the disc spaces at D10 and D11 and also the lumbar area. I feel that these radiographic changes are far in excess of anyone who is 60 years of age and that this patient's history and the notes I have regarding this patient through the years, have indicated that his back problems are directly related to his 1972 and again his 1975 work accident.
>
> "The patient has not responded to any other medications except Orudis and physical therapy has failed. There is no surgical intervention which I would suggest that would give him any relief. Once again, I feel this patient is totally and permanently disabled. I feel that the injuries of the 1972 and 1975 are the reasons for this disability and I think that his back problems will never clear up but will only worsen with time."

By a compensation order dated September 24, 1986 the Office found the additional evidence was unreliable, lacking substantial probative value, and not sufficient to warrant modification of its prior decision.

The Board finds that appellant has established that he sustained a recurrence of total disability on January 4, 1985.

Appellant sustained injuries to his lumbar or lumbosacral spine on April 12, 1957, March 5, 1962, January 31, 1966, September 7, 1966, January 19, 1968, January 28, 1970, and February 5, 1975. Following the February 5, 1975 injury appellant did not work for almost nine years, and the Office paid him compensation for temporary total disability during this entire period.

Between February 5, 1975 and appellant's return to light duty on December 10, 1983 he was evaluated by numerous physicians, all of whom concluded that he was either totally or partially disabled by his degenerative arthritis of the low back and knees. The medical reports from these physicians establish that appellant's osteoarthritis was aggravated or otherwise worsened by his employment injuries. Dr. Buckley, to whom the Office referred appellant, did not address whether the degenerative arthritis was affected by appellant's employment injuries, but the panel at the Boston City Hospital concluded that appellant's back strain and knee sprain had resolved by April 1983, but that his degenerative osteoarthritis "can be considered to have been aggravated by his multiple injuries leading to multiple pains which for practical purposes impose certain limitations on his physical activities." This opinion is consistent with those of Drs. Moretti and Bianchi who considered appellant's osteoarthritis to be post-traumatic, and Dr. Caron who attributed appellant's degenerative changes to his employment injuries on the basis that these changes were far in excess of those expected to a person appellant's age.

On December 10, 1983 appellant returned to work at the employing establishment performing light duty. His restrictions were based on the work-tolerance limitations set forth by Dr. Pick of the Boston City Hospital panel, and on an opinion from Dr. Caron that he could perform the light-duty position offered by the employing establishment.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative, and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[1]

In the present case appellant has established that his injury-related condition changed as of January 4, 1985 and thereafter prevented him from performing the light duty he had performed since December 10, 1983. On January 4, 1985, the date he stopped his light-duty assignment, appellant was examined by Dr. Moretti, who reported that his low back pain had increased and that he had paravertebral muscle spasm, a condition not previously found on examination. Two weeks later appellant was examined by Dr. Caron, who stated that his condition had deteriorated and that he had become totally disabled. In an October 31, 1985 report Dr. Caron added that appellant's disability at that time was "directly related to his injury at work on February 5, 1975." In a July 22, 1986 report Dr. Caron explained why he considered appellant's deteriorated condition causally related to his employment injuries. Although Dr. Caron's history of appellant's February 5, 1975 injury was not consistent with the evidence relatively contemporaneous with that injury, appellant has sustained numerous injuries to his low back in employment-related falls including one down stairs. In light of these injuries, Dr. Caron's recitation of an incorrect history of the February 5, 1975 injury is not a sufficient basis to discount his support of causal relation, since this support was not predicated on the mechanism or severity of a particular injury but rather on his conclusion that appellant's degenerative arthritis was far more severe than expected for appellant's age, and that therefore this arthritis was worsened by his employment injuries. There is no dispute that appellant's degenerative arthritis as of January 4, 1985 is totally disabling, as there is no medical evidence to the contrary.

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[1] *Terry R. Hedman*, 38 ECAB 222 (1986).

The decisions of the Office of Workers' Compensation Programs dated September 24, 1986 and July 7, 1986 are reversed.

In the Matter of CLARA R. MORGAN *and* DEPARTMENT OF THE AIR FORCE, KELLY AIR FORCE BASE, San Antonio, Tex.

Docket No. 87-1694; Submitted on the Record;
Issued December 23, 1987

Before MICHAEL J. WALSH, GEORGE E. RIVERS, MICHELE VON KELSCH

The issue is whether the refusal of the Office of Workers' Compensation Programs to authorize a change of physicians for appellant constituted an abuse of discretion.

On August 31, 1970 appellant, then a 41-year-old electroplater, sustained an injury to her right wrist and right ankle when she slipped and fell while in the performance of duty. Appellant did not lose any time from work but she was reassigned as a file clerk as a result of this injury.

On June 21, 1974, appellant filed a recurrence of disability claim alleging that on May 3, 1974, she experienced back pains which were residual effects of the August 31, 1970 employment incident. Appellant stopped work on May 6, 1974.

Based on the submission of several medical reports of Dr. John H. Langston, a Board-certified orthopedic surgeon, the Office of

Workers' Compensation Programs, on October 10, 1974, accepted appellant's condition of "acute and chronic low back sprain associated with severe degenerative disease at the lumbosacral region" as work related. Appellant was found to be temporarily totally disabled and was paid compensation benefits commencing June 10, 1974.

Appellant remained on disability and periodically furnished the Office with medical progress reports prepared, initially, by Dr. Langston, and, subsequently, by Dr. Robert Dr. Bilderback, a Board-certified orthopedic surgeon.[1]

By letter dated January 15, 1982, the employing establishment offered appellant the position of automotive equipment dispatcher a position which involved intermittent sitting, walking and standing.

By reply dated January 20, 1982, appellant requested that the offer of employment be "held in abeyance" pending her submission of medical evidence from other doctors on the status of her condition.

By compensation order dated April 20, 1982, which incorporated a memorandum summarizing the evidence, the Office rejected appellant's claim for compensation on the basis that section 8106(c) of the Federal Employees' Compensation Act[2] precludes payment of compensation to a claimant who refuses suitable employment.[3] The Office found that the medical evidence indicated that appellant was capable of working eight hours a day within certain restrictions and that she was offered, and she refused to accept, suitable employment without submitting evidence justifying such refusal. Accordingly, appellant's compensation for disability was terminated by the Office on March 24, 1982.

By letter dated May 11, 1982, appellant, through her attorney, requested a hearing before an Office hearing representative on the April 20, 1982 decision of the Office.

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[1] The record indicates that on March 22, 1976 Dr. Langston notified the Office that appellant had a "15% disability of the body as a whole" but could return to her former job as an electroplater. By letter dated April 21, 1976, the Office advised appellant that her compensation benefits had been terminated effective April 1, 1976 on the basis that the medical evidence of record no longer supported total disability. By a second letter dated May 5, 1976, the Office assured appellant that it was not discounting that her back condition existed but only that this condition did not render her totally disabled for work. Appellant objected to Dr. Langston's findings and requested a second opinion. The record indicates appellant changed doctors following Dr. Langston's March 22, 1976 report. In response to appellant's objection the Office referred appellant, her case file and a statement of accepted facts to Dr. Lorence W. Trick, a Board-certified orthopedic surgeon for a complete examination and evaluation. In a report dated October 25, 1976, Dr. Trick concluded that appellant was unable to perform either of her two former jobs (electroplater or blue print clerk). The findings of Dr. Trick were reviewed by an Office medical adviser who in a report dated March 18, 1977, agreed with the doctor's conclusions. By letter dated March 19, 1977, the Office advised appellant that her claim for compensation had been reinstated.

[2] 5 U.S.C. section 8101 *et seq.*

[3] 5 U.S.C. section 8106(c).

A hearing was held on July 23, 1982. At the hearing Dr. Bilderback testified that he thought appellant was physically capable of performing the duties of an automotive equipment dispatcher.

In a decision dated November 22, 1982 and finalized that same day, the Office hearing representative affirmed the April 20, 1982 decision of the Office finding that the medical evidence of record supported the Office's decision to terminate appellant's compensation benefits because of her refusal to accept suitable employment offered by the employing establishment.

By letter dated June 3, 1983, appellant requested reconsideration of her case.

By compensation order dated August 15, 1983, incorporating a memorandum summarizing the evidence, the Office notified appellant that it had reviewed her case on the merits under 5 U.S.C. section 8128 and had denied modification of its prior order of April 20, 1982 on the basis that the medical evidence was insufficient to warrant modification of the prior decision.

By letter dated January 16, 1984, appellant requested reconsideration and in support of her request, submitted the October 4 and 11, 1983 and January 12, 1984 medical reports of Dr. Bilderback. In his October 11, 1983 and January 12, 1984 report, Dr. Bilderback diagnosed appellant's condition as lumbar spondylosis but stated that she was capable of performing "half day work" involving "light activity." In his January 12, 1984 report, Dr. Bilderback repeated his diagnosis and stated that appellant could perform some type of light activity.

By compensation order dated March 19, 1984, which incorporated a memorandum summarizing the evidence, the Office notified appellant that it had reviewed her case on the merits under 5 U.S.C. section 8128 and had denied modification of its prior order of April 20, 1982 on the basis that the medical evidence was insufficient to warrant modification of the prior decision.

By letter dated July 11, 1984, appellant requested authorization from the Office to change physicians from Dr. Bilderback to Dr. James W. Simmons, a Board-certified orthopedic surgeon, for the reasons that she was not receiving adequate medical care from Dr. Bilderback and she desired a second opinion on her current condition.

By letter dated July 17, 1984, the Office advised appellant that she was free to consult with another physician but she would not be reimbursed for expenses incurred.

By letter dated September 6, 1984, appellant requested reconsideration of her case and, in support of her request, submitted the

August 2, 3, 23 and 24, 1984 medical reports of Dr. Simmons and the medical report of appellant's neurological examination by Dr. Wilbur S. Avant, Jr., a Board-certified neurologist of professorial rank.

In his August 23 and 24, 1984 medical reports, Dr. Simmons stated that appellant was under his care for significant discogenic disease and opined that she was unable at this time to carry out any type of gainful employment.

On October 1, 1984, appellant's case file and a statement of accepted facts were referred to Dr. Vert Mooney, a Board-certified orthopedic surgeon for a review and evaluation. In a report dated October 26, 1984, Dr. Mooney stated that there was no evidence that appellant's condition had changed substantially since June of 1981 and concluded that she could assume work involving minimal physical demands such as the position of automotive equipment dispatcher. He further opined that an additional independent evaluation of appellant would offer no new information. With respect to a question by the Office as to whether a change in physicians from Dr. Bilderback to Dr. Simmons was warranted, Dr. Mooney replied that he could find no evidence in the record that Dr. Bilderback had incorrectly evaluated appellant or offered treatment inconsistent with normal medical practice.

By compensation order dated November 26, 1984, which incorporated a memorandum summarizing the evidence, the Office denied appellant's application for review on the basis that the evidence submitted in support of her application for review was of a cumulative nature and not sufficient to warrant a review of the prior decision.

By letter dated November 30, 1984, the Office advised appellant that it continued to recognize Dr. Bilderback as her authorized treating physician and that it saw no advantage in authorizing a change in physicians but that appellant was free to be treated by Dr. Simmons at her own expense.

By letter dated June 2, 1986, appellant through her attorney, requested permission to change physicians from Dr. Bilderback to Dr. Simmons and further requested that appellant's compensation benefits be reinstated.

By letter dated June 12, 1986 the Office notified appellant, through her attorney, that no medical evidence had been submitted to date warranting modification of the April 20, 1982 decision of the Office and no evidence had been submitted indicating that Dr. Bilderback was delivering inappropriate or inadequate medical care.

By letter dated July 1, 1986, appellant, through her attorney, requested reconsideration of the Office's April 20, 1982 decision and the Office's refusal to allow appellant to change physicians alleging, with respect to the latter that, among other things, Dr. Bilderback had significantly reduced his staff making it difficult to schedule appointments and receive treatment.

In support of her reconsideration request, appellant submitted the April 23 and 30, 1986 and May 19, 1986 reports of Dr. Avant and an April 30, 1986 carotid imaging study report of Dr. Stephen F. Hoffman, a Board-certified neurologist of professorial rank.

In his reports, Dr. Avant diagnosed appellant's condition as Bell's palsy and did not address the issue of causal relationship between this condition and her accepted condition of chronic low back pain. The carotid imaging report of Dr. Hoffman discussed findings on examination of appellant for Bell's palsy.

By compensation order dated August 22, 1986, which incorporated a memorandum summarizing the evidence, the Office denied appellant's application for review on the basis that the material submitted in support of review was immaterial and not sufficient to warrant a review of the prior decision. The order found that no formal decision had been entered on appellant's request for a change of physicians and recommended that a letter decision be entered by the Office denying a change of physicians.

By letter decision dated August 25, 1986, the Office denied appellant a change of physicians.

By letter dated September 17, 1986, appellant through her attorney, requested a hearing on the decision of the Office dated August 25, 1986.

A hearing was held on April 10, 1987. At the hearing, both appellant and her attorney testified that they had heard that Dr. Bilderback was no longer practicing medicine.

In a decision issued by the Office hearing representative on June 24, 1987 and finalized on June 25, 1987, the Office hearing representative affirmed the decision of the Office dated August 25, 1986[4] finding that there was no medical evidence of record indicating that the medical care furnished by Dr. Bilderback was improper or inadequate. The Office hearing representative further found that because the Office has the obligation to ensure appellant receives adequate medical care, it should investigate whether Dr. Bilderback continues to practice medicine and should issue such further decision as may be necessary following this investigation.

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[4] The Board notes that on page 3 of the June 24, 1987 decision of the hearing representative, the August 25, 1986 decision of the Office denying appellant a change of physicians is incorrectly referred to as the August 22, 1986 decision.

By letter dated July 9, 1987, the Office authorized appellant to be treated by Dr. Simmons on the basis that the Office had learned that Dr. Bilderback was no longer practicing medicine.

The Board finds that the Office properly exercised its discretion under section 8103(a) of the Federal Employees' Compensation Act, as amended in 1974,[5] in refusing appellant permission to change treating physicians.

The 1974 amendment to the Act adopted the recommendation of the National Commission on State Workmen's Compensation Laws [6] that "the worker be permitted the initial selection of his physician, either from all the licensed physicians in the state or from a panel of physicians selected or approved by the workmen's compensation agency."[7] However, Congress did not restrict the Office's power to approve appropriate medical care after the initial choice of a physician. The Office still has the general objective of ensuring that an employee recovers from his injury to the fullest extent possible in the shortest amount of time. The Office therefore has broad administrative discretion in choosing means to achieve this goal within the limitation of allowing an employee the initial choice of a doctor. Section 10.401(b) of Title 20 of the Code of Federal Regulations [8] is an appropriate exercise of that discretion which does not conflict with 5 U.S.C. section 8103(a). This section provides in relevant part that: "A claimant has an initial choice of physicians. * * * An employees who wishes to change physicians must submit a written request to the Office fully explaining the reasons for the request. The Office may approve the request in its discretion if sufficient justification is shown for the request."

The instant case does not involve the initial selection of a physician.[9]

Appellant's initial reasons for desiring to change physicians were that she was not receiving adequate medical care from Dr. Bilderback and that she desired a second opinion. However, subsequently in July 1986, appellant alleged that it was very difficult to schedule an appointment with Dr. Bilderback because he had significantly reduced his staff. The fact, however, that appellant experienced long delays in waiting for appointments is not necessarily indicative that she is receiving less than proper or adequate medical treatment[10] and appellant brought forth no evidence to support that she required more frequent medical examinations than those conducted by Dr. Bilderback.

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[5] 5 U.S.C. section 8103(a), as amended, 88 stat. 1144.

[6] H. Rept. No. 93-1025, p. 4; S. Rept. No. 93-1081, p. 5.

[7] *Report of the National Commission on State Workmen's Compensation Laws* (1972), pp. 78-79, 80-81.

[8] 20 C.F.R. section 10.401(b).

[9] *Mallie Ethelyn Hunt*, 32 ECAB 317 (1980).

As abuse of discretion can be shown only through proof of manifest error, a manifestly unreasonable exercise of judgment, action of the kind that no conscientious person acting intelligently would reasonably have taken, prejudice, partiality, intentional wrong, or action against logic.[11]

The Board finds that there was no abuse of discretion by the Office in refusing to authorize a change of physicians.

At the hearing held before an Office hearing representative on April 10, 1987 appellant's attorney alleged that Dr. Bilderback was ill in the latter part of 1986 and had closed his practice sometime in early 1987 but he brought forth no objective evidence in support of this allegation. In the decision of the Office hearing representative dated June 24, 1987, the Office hearing representative found that the Office had an obligation to investigate this allegation. The Office subsequently confirmed that Dr. Bilderback had closed his practice and by letter dated July 9, 1987, the Office authorized a change of physicians for appellant.

Appellant may be entitled to reimbursement for expenses incurred for medical services provided for her accepted condition by Dr. James W. Simmons, a Board-certified orthopedic surgeon, from the date that Dr. Bilderback closed his practice or may have refused appellant treatment due to illness or other reasons.

The Board finds that the Office has the obligation to further investigate when medical care by Dr. Bilderback was no longer possible for appellant. The case is remanded to the Office for consideration and investigation of this issue and a de novo determination of the date appellant is entitled to reimbursement for medical expenses related to treatment by Dr. James W. Simmons for her accepted condition.

The decisions of the Office of Workers' Compensation Programs dated August 25, 1986 and June 25, 1987 are hereby affirmed insofar as these decisions found that the Office did not abuse its discretion in refusing to allow appellant a change of physicians. With respect to appellant's entitlement to reimbursement of medical expenses for treatment by Dr. Simmons, the case is returned for a *de novo* determination.

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[10] *See Donn J. Prendergast*, 31 ECAB 1832 (1980).

[11] *See Sherwood Brown*, 32 ECAB 1847 (1981).

In the Matter of Steven R. Piper *and* U.S. Postal Service, Post Office, Prairie Village, Kans.

Docket No. 87-2002; Submitted on the Record;
Issued December 28, 1987

Before Michael J. Walsh, Michele von Kelsch, Willie T.C. Thomas

The issues are: (1) whether appellant has met his burden of proving that he has a back condition causally related to a November 8, 1986 employment incident; and (2) whether appellant is entitled to reimbursement of expenses incurred for medical services rendered in connection with a November 8, 1986 medical examination.

On November 14, 1986 appellant, then a 29-year-old letter carrier, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that on November 8, 1986, he injured his back when he attempted to pick up a tray full of mail. Appellant stopped work that day and sought emergency medical treatment at St. Joseph's Hospital. Appellant lost no time from work [1] but is claiming reimbursement of medical expenses. On the reverse side of the Form CA-1, the employing establishment indicated that it was controverting appellant's claim but in its statement which accompanied the claim, no reasons for controversion were submitted. The employing establishment's statement disclosed that following the employment incident, appellant's supervisor told him to report to the emergency room of St. Joseph's Hospital.

By letter dated December 10, 1986 the Office of Workers' Compensation Programs requested that appellant submit additional factual and medical information in support of his claim.

In response to this letter, appellant submitted his statement of facts and circumstances surrounding the employment incident and the hospital admission report dated November 8, 1986. The hospital admission report stated that appellant was admitted for possible injury to back and possible bronchitis with a history of "cold past two weeks . . . pain in back when cough or after carrying mailbag all day." The diagnosis was "flu syndrome and acute bronchitis."

By compensation order dated January 13, 1987, which incorporated a memorandum summarizing the evidence, the Office denied appellant's claim on the basis that he failed to submit medical opinion evidence supporting a causal relationship between his claimed back condition and the November 8, 1986 employment incident. In this order, the Office terminated the prior authorization of medical treatment.

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[1] The record shows that the employment incident occurred on a Saturday, at the end of appellant's work shift, and that he had already scheduled annual leave for several days during the following week.

In an undated letter received by the Office on January 30, 1987, appellant requested reconsideration of his case.[2]

In support of his request for reconsideration, appellant submitted the November 8, 1986 hospital admission report previously submitted to the Office, accompanied by a new report of the emergency room attending physician undated but received January 30, 1987 who examined appellant on November 8, 1986, and which report had not been previously submitted to the Office. This report stated in relevant part as follows:

> "* * * [Appellant] also has a second complaint—back pain which is noted also on the chart . . . but not completely discussed. Apparently, the patient had onset of sharp back pain in upper back following an attempt to lift a mailbag about 15 minutes before he arrived in the [emergency room]. This diagnosis (back pain) should also have been recorded but was not. By history, this pain was related to a work incident (lifting mailbag) and this back pain was unrelated to the pain he was having in his lower back from coughing.
>
> "I believe this patient was here primarily for the work-related incident and that this should be [workers' compensation] by the patient's history."

By compensation order dated February 25, 1987, which incorporated a memorandum summarizing the evidence, the Office notified appellant that it had reviewed his case on the merits under 5 U.S.C. section 8128 and had denied modification of its prior order of January 13, 1987 on the basis that the medical evidence submitted by appellant in support of reconsideration was insufficient to warrant modification of the prior decision.

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[2] The record indicates that concurrent with submission of his request for reconsideration, appellant filed a recurrence of disability claim (Form CA-2a) dated January 20, 1987 alleging that on January 16, 1987, he experienced back pain related to the November 8, 1986 employment incident. Due to administrative oversight by the employing establishment, this claim was not forwarded to the Office until May 21, 1986. Appellant lost no time from work but claimed reimbursement of expenses for medical services rendered on January 16, 1987. In support of his claim, appellant submitted the January 22, 1987 attending physician's report of Dr. Charles E. Jones, Board-certified in emergency medicine and family practice. In this report, Dr. Jones gave a diagnosis of "chronic lumbar strain" but did not give his findings on physical examination or a statement on a causal relation. By letter dated June 2, 1987 the Office notified appellant that it could not accept his recurrence of disability claim on the basis that, through its decisions of January 13, 1987 and February 25, 1987, it had not accepted that appellant sustained a back injury causally related to the November 8, 1986 employment incident. Because the Office did not render a final decision on appellant's recurrence of disability claim, it is not subject to review by the Board. *See* 20 C.F.R. section 501.2(c).

The Board finds that appellant has failed to meet his burden of proving that he has a back condition causally related to a November 8, 1986 employment incident.

A person who claims benefits under the Federal Employees' Compensation Act [3] has the burden of establishing the essential elements of his claim.[4] Appellant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which he seeks compensation is causally related to a specific employment incident or to specified conditions of his employment.[5] As part of this burden, rationalized medical opinion evidence, showing causal relation must be presented.[6] The mere fact that a condition manifests itself or is worsened during a period of employment does not raise an inference of causal relationship between the two.[7] Such a relationship must be shown by rationalized medical evidence of causal relation based upon a specific and accurate history of employment incidents or conditions which are alleged to have caused or exacerbated a disability.[8]

The medical evidence submitted by appellant does not meet this criteria. The November 8, 1986 hospital admission report diagnosed appellant's condition as flu syndrome and acute bronchitis. The report of the emergency room attending physician, submitted by appellant in support of reconsideration, stated that a diagnosis of back pain should have been recorded on the hospital admission report but offers no objective findings or medical justification for this diagnosis. With respect to causal relation, the attending physician simply reiterated the history of appellant's back condition as related by appellant and did not offer, independently, an opinion of causal relation based on an accurate and complete factual and medical background of appellant and the employment incident. Accordingly the medical evidence submitted by appellant is of little probative value and insufficient to substantiate his claim.

The Board further finds that appellant is not entitled to reimbursement of expenses incurred for medical services rendered in connection with the November 8, 1986 medical examination.

The Board has held that where an employing establishment, pursuant to Office regulations,[9] authorizes medical treatment or a medical examination as a result of an employee's claim of sustaining an employment-related injury, a contractual obligation is created which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim.[10]

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[3] 5 U.S.C. section 8101 *et seq.*

[4] *Margaret A. Donnelly*, 15 ECAB 40 (1963).

[5] *William Nimitz, Jr.*, 30 ECAB 567 (1979).

[6] *Id.*

[7] *See Earl Everett Wilcox*, 34 ECAB 405 (1982); *Edgar L. Colley*, 34 ECAB 1691 (1983).

[8] *William Nimitz, Jr.*, *supra*, note 5.

[9] 20 C.F.R. Part 10, Subpart E.

The record shows that appellant's November 8, 1986 examination and treatment at St. Joseph's Hospital was not authorized by the employing establishment in accordance with Office regulations so as to entitle appellant to reimbursement of expenses related thereto. The regulations of the Office provide in relevant part as follows:

> "When an employee sustains a job-related injury which may require medical treatment, the designated agency official shall promptly authorize such treatment by giving the employee a properly executed [Form] CA-16 within four hours." [11]

With respect to emergency medical treatment, the regulations provide in relevant part:

> "In cases of traumatic injury where emergency treatment is necessary, any duly qualified physician may render initial treatment. If oral authorization for such treatment is given by the designated agency official, a Form CA-16 shall be issued within 48 hours thereafter." [12]

In the instant case, the employing establishment did not submit a properly executed Form CA-16, thereby authorizing medical treatment for appellant in accordance with Office regulations. Oral authorization, or the appearance of oral authorization by the employing establishment, does not, without a properly completed and executed Form CA-16, create a contractual obligation on the part of the Office to pay for, or reimburse appellant for expenses in connection with medical services rendered for an alleged employment injury.

The decisions of the Office of Workers' Compensation Programs dated January 13, 1987 and February 25, 1987 are hereby affirmed.

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[10] *Frederick J. Williams*, 35 ECAB 805 (1984); *Beverly A. Scott*, 37 ECAB 838 (1986); *David L. Sala*, 38 ECAB 419 (1987).

[11] 20 C.F.R. section 20.402(a).

[12] 20 C.F.R. section 10.404.

In the Matter of SALVATORE PREVITE *and* DEPARTMENT OF THE NAVY, NAVAL AIR STATION, Quonset Point, R.I.

Docket No. 87-1641; Submitted on the Record;
Issued December 28, 1987

Before GEORGE E. RIVERS, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether appellant's claim for a hearing loss is barred by the applicable time limitation provision of the Federal Employees' Compensation Act.

On August 21, 1976 appellant, then a 55-year-old retired letterer and grainer, and leader, filed a claim alleging he had sustained a hearing loss as a result of exposure to hazardous noise during his federal employment.[1] Appellant indicated his reason for not giving notice within 48 hours of the injury was that the "hearing loss was gradual."

In answers to questions posed by the Office of Workers' Compensation Programs dated September 10, 1976 appellant stated that he had worked at the employing establishment for 22 years and had not been exposed to hazardous noise at any other place. Appellant noted he had last been exposed to hazardous noise on June 29, 1973 the date of his retirement.

Appellant related that he first became aware of a hearing problem in July 1976 when his wife commented that she could not get his attention when his back was turned and that he never seemed to hear the telephone or doorbell. Appellant also reported that in July 1976 he first related his hearing loss to noise exposure at work when he met a former fellow worker who had received compensation due to noise exposure at work. Appellant noted he was issued ear defenders in 1960 and was told if he wore them, he would be fully protected.

By letter dated May 1, 1978 the Office requested further information from appellant regarding whether he met the time limitations of the Act. By letters dated June 17, 1978 and June 30, 1978 appellant related that he first became aware of a hearing problem through comments by his wife in July 1976. He first related the hearing problem to noise exposure at work in July 1976 when he talked to a former coworker and by reading a magazine article entitled "How Modern Life Can Damage Your Hearing." Appellant stated that he was given hearing tests twice by the employing establishment but was told nothing during these tests. Appellant related that he believed his hearing loss was caused at work because he had good hearing before his federal employment. Appellant noted he was issued ear defenders in the summer of 1960 and told he would be fully protected from dirt, spray and dust.

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[1] Employing establishment records show appellant was exposed to a noise level of 85 decibels and below for his 22 years of federal employment.

Upon request by the Office the employing establishment submitted appellant's medical records. On a medical report by an employing establishment physician dated May 2, 1972 it was noted "see audiogram, high tone loss left." Also included were audiograms dated August 26, 1960, May 2, 1972 and August 28, 1973. Notes dated August 26, 1960 stated "Periodic audiogram fitted (M)." In response to a June 29, 1982 letter from the Office, appellant indicated he had never been fitted for a hearing aid. Appellant also noted that he was told "nothing" regarding his hearing at the time he was tested.

By letter dated September 15, 1982 appellant was referred to Dr. Joseph Bellino, a Board-certified otolaryngologist, for examination. On September 23, 1982 appellant was examined by Dr. Peter T. Nigri, a Board-certified otolaryngologist and associate of Dr. Bellino. In a report dated September 27, 1982 Dr. Nigri reviewed appellant's past history and related that examination of the ear, nose and throat was essentially normal. Dr. Nigri reported that an audiogram showed a sloping mild to moderate sensorineural hearing loss; that appellant had sustained a 1.0 percent hearing loss in his left ear and a 24 percent hearing loss in his right ear; and that the configuration of appellant's hearing loss "is not entirely consistent with noise-induced trauma as there is a difference between the left and right side."

On April 7, 1983 an Office medical adviser reviewed the medical evidence of record including a statement of accepted facts and noted that Dr. Nigri's report indicated appellant had a sensorineural hearing loss secondary to noise exposure. The Office medical adviser calculated an approximate 13 percent loss and agreed with Dr. Nigri's conclusion that the audiogram results were not entirely consistent with noise induced trauma. He suggested the Office request Dr. Nigri to give a specific opinion regarding causal relation.

By letter dated May 2, 1983 Dr. Nigri responded to an Office request for clarification. He stated:

> "I would say that my medical opinion is that there is very little relationship between Mr. Previte's hearing loss and his

> employment with the U. S. Government. He has a difference of hearing between the right and left ear. On the basis of noise exposure, the only way that we could explain this difference between the two ears, would be a documented blast injury to his right ear. The slope of the hearing loss is more consistent with presbycusis on that left side. On the right side, presbycusis is superimposed on a previous incident of trauma or an infection."

On October 7, 1983 the case record and a statement of accepted facts was referred to Dr. Parviz Janfaza, a Board-certified otolaryngologist, who diagnosed bilateral noise-induced hearing loss, recommended a hearing aid, and concluded that "in the absence of other causes of his hearing loss and working in hazardous noisy area I believe that his hearing loss is caused by hazardous noise while he was working for the government."

On November 21, 1983 appellant was referred to Dr. P. R. Tipirneni, a Board-certified otolaryngologist. In a report dated December 5, 1983 Dr. Tipirneni reviewed appellant's past history and stated:

> "On examination, both external canals look normal; however, on the right side, there is exostosis noted on the posterior and inferior aspect of the external canal and also on the anterior wall of the external canal on the left side, some exostosis was noted on the posterior wall of the external canal. Otherwise, both TMs appear to be intact, no evidence of an infection is noted.
>
> "Patient denied any history of ear infections in the past or as a child and has had good health, except for a history of some heart trouble. Otherwise the rest of the ENT examination was essentially within normal limits.
>
> "Screening and tympanogram today revealed a 30 decibel hearing loss on the right side and a 20 decibel hearing loss on the left side with 68 percent discrimination on the right and 76 percent discrimination on the left. Hearing loss is of a sensorineural type. Tympanograms were essentially within normal limits; however, because of his poor discrimination, the patient will be advised to have the BSER.
>
> "Impression: Sensorineural hearing loss, probably secondary to presbycusis.
>
> "Recommendations: BSER. After the BSER, the patient will be reevaluated and a letter will be dictated to the Department of Labor."

Upon interpretation of the audiogram Dr. Tipirneni stated:

> "Patient was referred by the Department of Labor for diagnostic audiological testing. He reported occasional hearing difficulty from a distance and in the presence of background noise. This problem has been evident for the past ten years according to the patient. Patient had no other significant complaints. He stated that he is in good health. He reported a history of intermittent noise exposure related to his employment at Quonset Point from 1951 through 1973. Patient stated that he used ear protection on a limited basis. He stated that he has not been exposed to intense noise levels for the past 16 hours.
>
> "Pure tone testing was completed with good reliability and indicated normal hearing for the right ear through 500 Hz. after which a mild to a severe sloping sensorineural hearing loss occurred. Results for the left ear revealed normal hearing through 1,000 Hz. after which a mild to moderate sensorineural hearing loss occurred. Speech reception thresholds were consistent with pure tone findings. Speech discrimination scores were 68 percent of the right ear and 76 percent for the left ear."

On December 8, 1983 appellant was again seen by Dr. Tipirneni who concluded that appellant's sensorineural hearing loss was probably secondary to presbycusis.

On October 18, 1984 appellant was referred for further BSER testing which did not provide any significant evidence suggesting retrocochlear and/or brain stem involvement. In a report of that same day Dr. Tipirneni indicated that appellant's audiogram of 1960 and 1964 showed a moderate sensorineural hearing loss. Dr. Tipirneni concluded that appellant had sustained a bilateral sensorineural hearing loss. With regard to the issue of causal relation Dr. Tipirneni concluded that he could not definitely state whether or not appellant has a sensorineural hearing loss secondary to noise exposure, as he did not have any record of audiograms between 1951 and 1960.

By compensation order dated December 13, 1984 the Office denied appellant's claim for compensation finding the weight of the medical evidence established that appellant's hearing loss is related to presbycusis and not due to factors of his federal employment.

Appellant filed an application for review before the Board on January 8, 1985, appealing the Office's December 13, 1984 decision. By order granting remand dated April 20, 1985 the Board set aside the Office's December 13, 1984 decision and remanded the case to the Office to determine whether the claim was timely filed.

By letter dated June 18, 1985 the Office requested additional information from appellant regarding whether appellant's claim was timely. By letter dated June 26, 1985 appellant responded stating:

> "(1) I had no problems with my hearing while employed at the Naval Station. There was no effect of the noise on my ears during my employment that I was aware of therefore I did nothing about it. Of course I wore ear defenders when they were issued to me in 1960 onward. I thought they were issued to fully protect my ears from dust, dirt, infectious and hot sparks.
>
> "(2) As indicated in answers filed on 6-17-78, I first learned I had a hearing loss in July of 1976 and also then learned of its causal connection. I filed my claim on 9-2-76 well within the one-year rule."

On July 10, 1986 an Office medical adviser reviewed the 1960, 1972 and 1973 audiograms of record. The medical adviser noted that both the 1972 and 1973 audiograms revealed a sensorineural hearing loss particularly in the higher frequencies and indicated that the 1960 audiogram revealed a much more severe hearing loss particularly in the left ear. The audiogram indicated a sensorineural hearing loss in the right ear particularly in the higher frequencies and the left ear revealed both a low and high frequency hearing loss. The medical adviser commented "in view of the fact that there are no bone conduction levels, I am not certain of the reliability of this audiogram."

By compensation order dated June 22, 1987 the Office denied appellant's claim for compensation finding the claim was untimely. However, the Office found appellant was entitled to medical benefits under the Act for his hearing loss since his immediate supervisor had actual knowledge within 48 hours.

The Board finds that appellant's claim for a hearing loss was timely filed.

The Federal Employees' Compensation Act requires in cases of occupational hearing loss occurring prior to September 7, 1974 that claim for compensation be filed within one year of the date that the claimant is aware, or reasonably should have been aware, that his hearing loss may have been caused by factors of his employment. The requirement may be waived, if the claim is filed within five years, and 1 it is found that failure was due to circumstances beyond the control of the person claiming benefits; or (2) that such person has shown sufficient cause or reason in explanation thereof, and material prejudice to the interest of the United States had not resulted from such failure.[2] The Board finds that appellant did not become aware of a possible relationship between his hearing loss and his employment until July 1976. Appellant filed his claim on August 21, 1976. His claim was timely filed as it was within the one-year time limitation period prescribed under the Act.

The Office found in its June 22, 1987 decision that appellant's claim was untimely filed as it concluded that appellant was aware, or reasonably should have been aware, that he had a hearing loss which was caused by factors of his federal employment in June 1973, the date of his retirement and last exposure to hazardous noise. The Office based its conclusion that appellant's claim was untimely filed on the following evidence of record: that appellant was first issued ear defenders for what he believed and was told was protection against "dust, dirt, infections and hot sparks" in 1960; that appellant was given hearing tests in 1960, 1972 and 1973 all of which revealed sensorineural hearing loss; [3] that on appellant's claim form, he indicated "hearing loss was gradual" in response to a question asking why he had not given notice of his injury within 48 hours; that medical notes from Dr. Tipirneni dated December 5, 1983 stated "the patient states that before he started working at Quonset Point, he had good hearing and afterwards he gradually lost his hearing and has had some difficulty hearing more on the right side now"; and that on interpretation of the audiogram of that same date it was noted that appellant's hearing problem "has been evidence for the past ten years according to the patient."

The above evidence fails to demonstrate that appellant was aware, or reasonably should have been aware, of his hearing loss and its relation to factors of his federal employment prior to July 1976. Appellant was issued ear defenders in his federal employment, but was told and believed they were protection for nonnoise-related concerns. Appellant also was given hearing tests during his federal employment, however, he stated that he was told "nothing" at the time of these tests. The balance of the evidence relied upon by the Office in reaching its finding that appellant's claim was untimely filed under the Act, was evidence procured at the time appellant filed his claim in 1976, and evidence received in 1983 by Dr. Tipirneni. These statements are of little probative value as they fail to demonstrate appellant's awareness of a hearing loss condition and its causal relation, prior to July 1976. In this connection it should be pointed out that appellant did not work with equipment that was deemed hazardous to his hearing; was of the impression that the ear protectors that he was issued were issued as a safety precaution to protect him physically from harm, from dust, sparks, etc; and although he may have been aware of a gradual loss of hearing the evidence is insufficient to pinpoint a time he related it to his employment prior to July 1976. Since less than one year elapsed from July of 1976 to August 21, 1976, the date appellant filed his claim, the claim was timely filed within the provisions of Federal Employees' Compensation Act.

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[2] 5 U.S.C. section 8122(a) (1966).

[3] Although the Office indicates that the employing establishment gave appellant annual hearing tests in its June 22, 1987 compensation order and the August 26, 1960 notes by the employing establishment state "periodic audiogram Fitted (M)" there are only three audiograms on record and appellant indicated on a questionnaire filled out June 17, 1978 that he had only been given hearing tests "twice."

The decision of the Office of Workers' Compensation Programs dated June 22, 1987 is set aside; the case is remanded to the Office for further development in accordance with this decision.

In the Matter of CHARLES E. DAVIS *and* U.S. POSTAL SERVICE, POST OFFICE, Chicago, Ill.

Docket No. 87-1662; Submitted on the Record;
Issued December 29, 1987

Before GEORGE E. RIVERS, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly recovered $1,721.00 in continuation of pay from appellant's third party recovery.

On May 11, 1985 appellant, then a 49-year-old tractor trailer operator, filed a claim for compensation alleging that he injured his left shoulder and back when his tractor was struck by a van earlier that day. Appellant stopped work on May 11, 1985 and returned to work on light duty on June 7, 1985. Appellant resumed regular duty two weeks after returning to work. The Office of Workers' Compensation Programs accepted appellant's claim for contusion of the left shoulder, and authorized payment for continuation of pay in the amount of $1,721.00 as well as payment for his medical expenses.

On June 16, 1985 appellant filed a notice of a third party claim, stating that he intended to take action against the third party who hit his tractor on May 11, 1985.

On January 23, 1986 appellant's claim against the third party was settled for $5,500.00. The Office advised appellant of the pertinent provisions of the Federal Employees' Compensation Act pertaining to third party recoveries and stated: from the $5,500.00 gross recovery there was deducted property damage, attorney fees and cost of litigation in the amount of $1,934.41. From the net recovery of $3,565.59 appellant was advised of his right to retain $2,852.47, representing his one fifth statutory share of the net recovery. The government deducted continuation of pay in the amount of $1,721.00 and medical expenses in the amount of $345.00. The remaining surplus of $786.47 was determined to be the government's credit to offset future compensation payments to appellant.

By letter dated March 24, 1986 the Office informed appellant that it had incorrectly received only $230.00 from the disbursement of his third party settlement claim. The Office in fact, spent $430.00 for medical expenses, not $345.00, on appellant's claim, and was entitled to a $286.66 reimbursement once the government's allowance for attorney's fee was deducted. Appellant was asked to pay the Office the balance due of $56.66. On April 5, 1986 appellant paid the $56.66 to the Office.

On March 24, 1986 the Office issued the Federal Employees' Compensation Act Bulletin No. 86-30 in response to the Board's decision in *Paul L. Dion*. The FECA Bulletin No. 86-30 stated that continuation of pay would no longer be collected from the third party recoveries, but that any continuation of pay already collected need not to be returned.

By letter dated June 9, 1986 appellant asked the Office if, according to FECA Bulletin No. 86-30, he was entitled to a reimbursement of the money he paid his employing establishment from his third party settelement. Appellant claimed that his settlement was not closed prior to March 24, 1986, because he was asked to pay an additional refund of $56.66 on March 24, 1986, which he did not pay until April 5, 1986.

By compensation order dated May 27, 1987 the Office rejected appellant's claim for reimbursement of the $1,721.00 he paid the employing establishment for continuation of pay on the grounds that the continuation of pay was already collected from the third party settlement and sent to the employing establishment prior to March

24, 1986. The $56.66 adjustment was considered part of the original refund.

By letter dated June 22, 1987 appellant requested a hearing before an Office hearing representative. On July 23, 1987 appellant filed an application for review before the Board.

On September 25, 1987 the Director of the Office of Workers' Compensation filed a motion to dismiss appellant's application for Appeals Board review on the grounds that the Board and Office cannot exercise concurrent jurisdiction, and appellant requested a hearing before an Office hearing representative prior to filing an appeal.

Appellant was served a copy of the Director's motion and responded on November 27, 1987 objecting to the motion. Appellant requested that the Board proceed with a decision on his appeal. On December 2, 1987 the Board issued an Order Denying Motion to Dismiss.

The Board finds that it was improper for the Office to recover the $1,721.00 in continuation of pay from appellant's third party recovery.

Section 8132 provides that an employee who sustains injury for which compensation is payable under circumstances creating legal liability in a party other than the United States has the obligation to reimburse "to the United States the amount of compensation paid" once recovery is made against the responsible tortfeasor.[1] The purpose underlying this obligation is to prevent a double recovery by the employee.[2]

However, in *Donald M. Almquist,*[3] the Board reviewed similar language contained in 5 U.S.C. section 8106(c)(2) and found that continuation of pay did not constitute "compensation" within the meaning of 8106(c)(2) of the Act. The Board stated:

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[1] 5 U.S.C. section 8132 provides as follows:

> "Adjustment after recovery from third person. If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a legal liability in a person other than the United States to pay damages and a beneficiary entitled to compensation from the United States for that injury or death receives money or other property in satisfication of the liability as a result of suit or settlement by him or in his behalf, the beneficiary, after deducting therefrom the cost of suit and a reasonable attorney's fee, shall refund to the United States the amount of compensation paid by the United States and credit any surplus on future payments of compensation payable to him for the same injury. No court, insurer, attorney, or other person shall pay or distribute to the beneficiary or his designee the proceeds of such suit or settlement without first satisfying or assuring satisfication of the interest of the United States. The amount refunded to the United States shall be credited to the Employees' Compensation Fund. If compensation has not been paid to the beneficiary, he shall credit the money or property on compensation payable to him by the United States for the same injury. However, the beneficiary is entitled to retain, as a minimum, at least one-fifth of the net amount of the money or other property remaining after the expenses of a suit or settlement have been deducted; and in addition to the minimum and at the time of distribution, an amount equivalent to a reasonable attorney's fee proportionate to the refund to the United States."

[2] *David R. Gilmer,* 34 ECAB 1342.

[3] *Donald M. Almquist,* 33 ECAB 1850 (1982).

> "Section 8118, which provided for payment for continuation of pay, specifically states in subsection (e): 'Payments under this section shall not be considered compensation as defined by section 8101(12) of this title.' "
>
> "Section 8101(12) of the Act defines 'compensation' to include: '[T]he money allowance payable to an employee or his dependent and any other benefits paid for from the Employees' Compensation Fund, but this does not in any way reduce the amount of monthly compensation payable for disability or death." [4]

The present case involves a situation where the Office has sought to recover as "compensation" disbursements which were made to appellant as continuation of pay. However, since the Act specifically provides that continuation of pay shall not be considered "compensation," section 8132 does not authorize recovery of continuation of pay received by a claimant in third party situations. Therefore, in determining its credit and refund against appellant's third party recovery, the Office may not include the $1,721.00 of continuation of pay he received. Accordingly, the Board cannot approve the third party recovery calculations of record and the case must be remanded for redetermination of the government's credit and refund. Inasmuch as FECA Bulletin No. 86-30 allows the Office to keep continuation of pay collected from third party settlements prior to March 24, 1986 it is inconsistent with the Board's rulings in *Almquist,*[5] and *Paul L. Dion.*[6]

The May 27, 1987 decision of the Office of Workers' Compensation Programs is set aside; the case is remanded to the Office for recomputation of the government's credit and refund, to be followed by a *de novo* decision.

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[4] *Id.* at 1853-54.

[5] *Almquist, supra.*

[6] *Paul L. Dion,* 36 ECAB 656 (1985).

In the Matter of JERRY MILLS *and* VETERANS ADMINISTRATION, VETERANS ADMINISTRATION MEDICAL CENTER, Miami, Fla.

Docket No. 87-1806; Submitted on the Record;
Issued December 29, 1987

Before DAVID S. GERSON, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether appellant's injury on April 26, 1986 was sustained in the performance of duty.

On January 7, 1987 appellant, then a 28-year-old housekeeping aid, filed a claim alleging he sustained an injury to his back, mouth (broken upper braces), left wrist and "impaired mental status" as a result of an April 26, 1986 incident in which he was pushed to the floor by two Veterans Administration police officers. Appellant alleged that one officer knelt on appellant's back while the other officer fastened handcuffs on his left wrist in a manner that left cuts, bruises and swelling. The record indicates that appellant continued to work from the date of the incident, April 26, 1986, until April 29, 1986 at which time he was arrested and charged with possession of marijuana and assault on a Veterans Administration police officer as a result of the April 26, 1986 incident.

In a statement dated January 10, 1987 appellant's supervisor stated that the employing establishment controverted appellant's claim on the following grounds:

> "1. The injury occurred as a result of willful misconduct.
>
> > Mr. Mills is claiming he sustained work-related injuries that would not permit him to work. It is our contention that any injuries suffered were a result of his misconduct and his blatant disregard of a proper order. On 4-26-86 Mr. Mills was questioned regarding his suspected drug use on VA premises. During the questioning he assaulted a VA police officer and had to be physically restrained while a search was being conducted. Mr. Mills was found to be in possession of marijuana and was later charged by the U.S. District Court of 'Assaulting a VA Police Officer and possession of marijuana.'

"2. The employee initiated the CA-1 [claim form] after his employment was terminated.

> Mr. Mills was removed from his position of Housekeeping Aid . . . effective November 18, 1986. The CA-1, was received in this office December 17, 1986.

"3. The injury was not reported on a CA-1 within 30 days following the incident.

> The incident occurred on April 26, 1986. The CA-1 was received December 17, 1986."

A Veterans Administration Offense Report filed by one of the officers who appellant alleges assaulted him contained the following report of the April 26, 1986 incident:

> "ORIGIN OF REPORT: At approximately 9:00 a.m. on 4-26-86, I was patrolling the 10th floor, Main Building (VAMC), when I noticed a strong odor of what I suspected to be Marijuana, coming from a janitorial room D1003.
>
> "INITIAL OBSERVATION: Upon noticing the strong odor, of what I suspected to be Marijuana, I contacted VA Police Supervisor Thomas Parquet on the radio to . . . [accompany] me to the area. Then, I knocked on D1003 door, and [appellant] an employee from Building Management, came out of the room, no one else was inside.
>
> "INVESTIGATION: Supvr. Parquet arrived to the 10th floor as I stopped [appellant] to question him in reference to the suspected Marijuana odor. At this time, [appellant] stated that he didn't want to talk to us, and refused to be searched. [Appellant] proceeded to push me against the wall and continued to walk away, even when told he could not move until the matter was cleared. [Appellant] continued to resist until handcuffed. A search of [appellant's] person revealed a partially used cigarette, believed to be of Marijuana, hidden inside a pack of cigarettes which was in his right uniform pocket. Also, I found a small brown, coin envelope which contained a green vegetable matter, believed to be Marijuana."

The record indicates that as a result of the April 26, 1986 incident appellant was charged with assaulting a Veterans Administration police officer and possessing marijuana. The record also indicates that appellant was found guilty of assault and that the possession of marijuana charge was dismissed.[1]

In a January 28, 1987 letter to appellant the Office of Workers' Compensation Programs stated as follows:

> "The evidence submitted with the claim indicates that the claimed injury did not occur in the performance of your duties as a federal civilian employee, but, rather was the result of personal activities of your own which, in effect, removed you from the scope of your federal employment. Please be advised that injuries which occur on the work premises and in the course of the work day, but which do not arise out of factors of employment, are not afforded the protection of the Federal Employees' Compensation Act."

The Office gave appellant fifteen days in which to submit further evidence regarding his claim.

Appellant submitted copies of letters he had written the employing establishment in which he gave his version of the April 26, 1986 incident. Appellant asserted that he was engaged in the performance of duty, and was not engaged in drug use when he was confronted by the two Veterans Administration police officers who asked him to open the door to the janitorial closet, made a search of the closet and then asked appellant for permission to search his pockets. Appellant alleged that because he saw no reason for the search he declined to give the police officers permission, at which point they forcefully searched him. Appellant further alleged that the police officers used physical force against him because they held personal grudges against him rather than because he was engaged in illegal activity.

Appellant also submitted documents which indicated: the employing establishment issued a letter dated September 12, 1986 proposing appellant's removal for possession of drugs while on duty and unwillingness and inability to perform his duties; on November 12, 1986 the employing establishment issued a letter removing appellant effective November 18, 1986 for the above reasons; that appellant appealed the employing establishment's actions to the Merit Systems Protection Board; and that as a result of the action before the Merit Systems Protection Board appellant and the employing establishment entered into a settlement agreement whereby the employing establishment rescinded its action removing appellant and allowed appellant to resign.[2]

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[1] While the evidence indicates the charge of possession of marijuana was dismissed, a June 11, 1986 Metropolitan Dade County Police Department crime laboratory report indicated that "[a]n examination conducted on the above-mentioned item No. 4 [a cigarette butt found on appellant during the April 24, 1986 incident] revealed the presence of trace marijuana."

Appellant submitted copies of requests to the employing establishment for leave-without-pay for the period July 18, 1986 through April 4, 1987. He also submitted an August 28, 1986 report by Dr. Alan A. Gumer, a psychiatrist, which stated that appellant had required two inpatient hospitalizations during May and June 1986 due to "severe depression" and was not yet able to return to work.

By compensation order dated March 12, 1987 the Office rejected appellant's claim for compensation on the ground appellant did not sustain an injury while in the performance of duty. In a March 12, 1987 memorandum incorporated into the decision, the Office found that appellant's activities on April 26, 1986 had removed him from the scope of his federal employment.

By letter dated April 6, 1987 appellant requested a hearing before an Office hearing representative. The Office notified appellant by letter dated May 12, 1987 that a hearing was scheduled for June 17, 1987. Appellant failed to appear for the scheduled hearing. By decision dated July 7, 1987, the Office found that because appellant had failed to appear for the June 17, 1987 hearing and failed to either request cancellation at least three calendar days prior to the scheduled date for the hearing or show good cause within ten days after the scheduled date for the hearing, he had abandoned his request for a hearing under 20 C.F.R. section 10.137.[3]

The Board finds that the evidence fails to establish that appellant sustained an injury in the performance of duty on April 29, 1986.

The Federal Employees' Compensation Act provides for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[4] The term "in the performance of duty" has been interpreted to be the equivalent of the commonly found prerequisite in workers' compensation law, "arising out of and in the course of employment." [5] The phrase "arising out of and in the course of employment" encompasses not only the concept that the injury occurred in the work setting but also the causal concept that the employment caused the injury.[6]

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[2] The record indicates that appellant subsequently sought to repudiate the agreement and that the administrative judge handling the case contacted the employing establishment and stated that if both parties wished to consider the settlement null and void she would issue a decision based on the evidence. It is unclear from the record how this issue was resolved.

[3] Appellant has not appealed this decision to the Board.

[4] 5 U.S.C. section 8102.

[5] *Bernard D. Blum*, 1 ECAB 1, 2 (1947).

In the present case appellant's injury did occur on the premises of the employing establishment during his normal work hours, however, this alone is not sufficient to establish entitlement to compensation benefits.[7] Appellant has not established that his injuries on April 26, 1986 arose out of his employment. His injury did not occur while he was engaged in the employing establishment's business or in the duties he was employed to perform.[8] Instead, appellant was injured during an altercation with employing establishment police officers who were attempting to search him for suspected possession of an illegal drug while on the employing establishment premises. Hence, the injury did not occur as a result of the employment or of the conditions under which the employment was required to be performed but as a result of appellant's own misconduct.[9] The injury did not occur in the performance of duty and is not compensable under the Federal Employees' Compensation Act.

The decision of the Office of Workers' Compensation Programs dated March 12, 1987 is hereby affirmed.

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[6] *George A. Fenske, Jr.*, 11 ECAB 471, 472 (1960).

[7] *George A. Fenske, Jr., supra*, at 473.

[8] *Jeremiah Bowles*, 38 ECAB 652 (1987).

[9] *James E. Rambo*, 33 ECAB 1622 (1982).

In the Matter of William Phillips, Jr. *and* Central Intelligence Agency, Langley, Va.

Docket No. 87-350; Submitted on the Record;
Issued December 30, 1987

Before George E. Rivers, David S. Gerson, Michele von Kelsch

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of compensation in the amount of $1,480.78 occurred; (2) and if so, whether the Office abused its discretion in refusing to waive the overpayment; and (3) if not, whether the Office properly required repayment at the rate of $200.00 per month.

On April 21, 1972 appellant, then a 33-year-old office equipment technician, injured his lower back and right leg while lifting and moving office furniture and equipment. He stopped work the same day, and was off intermittently until July 19, 1972.

The Office of Workers' Compensation Programs accepted appellant's claim for ruptured lumbar disc L4–5 and paid him compensation for appropriate periods of wage loss, which included recurrence of disability on April 29, 1974 and February 6, 1975. Effective February 6, 1975 appellant was restored to compensation for temporary total disability.

In March 1986 an Office claims examiner reviewed appellant's case record and discovered that with the inception of the automatic compensation payment system in 1981 deductions for health benefits were inadvertently dropped from appellant's compensation payments, creating an overpayment of $1,480.78.

By letter dated May 1, 1986 the Office informed appellant of a preliminary determination that he had received an overpayment of compensation in the amount of $1,480.78. The letter explained that the overpayment had occurred because deductions for health benefits were inadvertently dropped with the inception of the automated compensation payment system. The Office further informed appellant that he was without fault in the matter, thus recovery of the overpayment could not be made if it could be shown that such recovery would defeat the purpose of the law or would be against equity and good conscience.

Appellant completed the overpayment recovery questionnaire on May 7, 1986 indicating that he received compensation benefits in the amount of $1,325.00 and his wife earned $2,680.00 for a total monthly income of $4,005.00. In addition appellant stated he had $125.00 cash on hand, a checking account balance of $2,000.00, and a savings account balance of $800.00. Appellant listed monthly expenses of $1,307.68 for housing, $400.00 for food, $400.00 for clothing, $200.00 for utilities, $600.00 for other miscellaneous expenses, and $228.34 for an automobile loan.

In a May 31, 1986 letter appellant alleged that recovery of the overpayment would constitute "unconscionable hardship" to him because repayment of the overpayment would "wipe out [his] liquidity" and that he was "barely able to make ends meet."

By letter decision dated September 15, 1986 the Office found that an overpayment in the amount of $1,480.78 existed in appellant's case because no deductions for health benefit premiums were made since 1981. The Office determined that the circumstances of appellant's case did not warrant waiver of the recovery of the overpayment as recovery would not create a severe hardship if recouped in monthly installments of $200.00. Thus, the Office determined that $200.00 would be withheld from appellant's continuing compensation payments.

The Board finds that the Office properly determined that an overpayment of compensation in the amount of $1,480.78 occurred.

An employee who is already enrolled in a health benefits program is entitled to continued coverage while receiving compensation under the Federal Employees' Compensation Act. Premiums are withheld from the employee's compensation payments.[1] FECA Bulletin No: 85-31 [2] provides that when an underwithholding of health insurance premiums is discovered, the entire amount is deemed an overpayment of compensation and subject to the waiver provisions of 5 U.S.C. section 8129, as well as to other statutes and regulations relative to overpayments and collection of debts.

In the instant case, when appellant's compensation payments began on the automatic compensation payment system (ACPS) effective April 23, 1981 the deductions for health benefits were inadvertently dropped, thus there was an underwithholding of health insurance premiums for the period April 23, 1981 to March 15, 1986. Pursuant to FECA Bulletin No. 85-31 an overpayment of compensation in the amount of $1,480.78 was created.

The Board further finds that the Office did not abuse its discretion by refusing to waive the overpayment of compensation.

Section 8129(a) of the Federal Employees' Compensation Act [3] provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience."

Paragraph 4(b)(1) of Chapter 2-901 of the Office's procedure manual [4] provides the following guidelines with respect to when recovery of an overpayment would defeat the purpose of the Act:

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[1] Federal (FECA) Procedure Manual, Health Benefits and Optional Life Insurance, Part 5—Benefit Payments, Chapter 5-400, FECA Tr. No. 86-2 (October 1985).

[2] Issued June 4, 1985.

[3] 5 U.S.C. section 8129.

[4] Federal (FECA) Procedure Manual, Overpayments, Part 2—claims, Chapter 2-901.4(b)(1), FECA Tr. No. 84-37 (August 1984).

"(1) Recovery of an overpayment will defeat the purpose of the subchapter if recovery would cause hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses under the criteria set out in this section. Recovery will defeat the purpose of the subchapter to the extent that:

> "(a) The individual from whom recovery is sought needs substantially all of his/her current income (including FECA monthly benefits) to meet current ordinary and necessary living expenses.
>
> "(b) The individual's assets do not exceed the resource base of . . . $5,000 for an individual with a spouse or a dependent, plus $600 for each additional dependent. This base includes all of the claimant's assets not exempted from recoupment. . . . The first $3,000 or more, depending upon the number of claimant's dependents is also exempted from recoupment. The purpose of this exemption is to ensure that recoupment does not leave the claimant without a sufficient buffer against emergencies."

In *Robert E. Wenholz,*[5] the Board found that sections 4(b)(1)(a) and (b) were meant to be read conjunctively and that a claimant must meet both conditions before recovery will defeat the purpose of the Act. Consequently, to establish that recovery would defeat the purpose of the Act, the facts must show that appellant needs substantially all of his income to meet his current and ordinary living expenses and also that his assets which are not exempted do not exceed a resource base of $3,000 (or $5,000 with a spouse or dependent).

In the present case, the Board notes that the financial data submitted by appellant indicates that his monthly expenses total $3,136.02 while his monthly income is $4,170.67.[6] Appellant's spouse's income is included in determining waiver because the individual's total income includes any funds which may reasonably be considered available for his use, regardless of the source. Income to a spouse is not considered unless the spouse was living in the household both at the time the overpayment was incurred and at the time waiver is considered.[7] As appellant has not presented any evidence that his spouse was not living in the household both at the time the overpayment occurred and at the time of waiver, his spouse's income is considered in determining his total income in determining whether recovery of the overpayment will defeat the purpose of the Act. Since the evidence clearly establishes that appellant does not need substantially all of his monthly income to meet his ordinary and necessary living expenses, waiver of the overpayment is not warranted under the "defeat the purpose of the Act" clause.[8]

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[5] 38 ECAB 311 (1987). *See also Manual W. Vetti,* 38 ECAB 453 (1987).

[6] The Office determined that appellant's correct gross compensation each 28 days, $1,376.00 pro-rated over a month equals $1,490.67. The compensation plus his spouse's income of $2,680.00 equals $4,170.67 each month. The record reveals that appellant's net compensation each 28 days is $1,350.50, after the health benefit deductions.

[7] Federal (FECA) Procedure Manual, Overpayments, Part 2—claims, Chapter 2-901.4(b)(2).

To determine whether recovery of the overpayment is against equity and good conscience, paragraph 4(c) of Chapter 2-901 of the Office's procedure manual provides, in pertinent part:

> "*Against Equity and Good Conscience.* If the claimant is not entitled to waiver under the defeat the purpose of the Act clause, the 'against equity and good conscience clause' must be considered. This clause is divided into two parts, financial hardship and detrimental reliance.
>
> "(1) *Financial Hardship.* It would be found to be against equity and good conscience when an individual who was never entitled to benefits would experience severe financial hardship in attempting to repay the debt. The criteria to be applied in making this determination are the same as given in item 4(b) above.
>
> "(2) *Detrimental Reliance.* Recovery of benefit payments is considered to be inequitable and against good conscience when a person, in reliance on such payments or on notice that such payments would be made, relinquished a valuable right or changed his position for the worse. In making such a decision, the individual's present ability to repay the overpayment is not considered."

Paragraph 4(c)(1) above does not apply to the instant case because appellant was and is entitled to compensation under the Act. Paragraph 4(c)(1) applies only to claimants who were never entitled to benefits. Thus, the next consideration is whether appellant relinquished a valuable right or changed his position for the worse in reliance on compensation payments.

The "detrimental reliance" provision as set forth in the Office's procedure manual contemplates waiver of an overpayment of compensation in situations where appellant has relinquished a valuable right or changed his position for the worse "in reliance on such payments or on notice that such payments would be made." In the present case, appellant does not allege and the evidence does not establish, that he changed his position for the worse or relinquished a valuable right in reliance on payment of compensation benefits, and therefore the Office did not abuse its discretion by refusing to waive recovery of the overpayment under this test.

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[8] Since appellant has not met the criteria of 4(b)(1)(a) it is not necessary to determine whether he has met 4(b)(1)(b) since the sections were meant to be read conjunctively, and a claimant must meet both conditions before recovery will defeat the purpose of the Act.

The Board further finds that the Office properly required repayment of the overpayment at the rate of $200.00 per month.

Section 10.314(a) of Title 20 of the Code of Federal Regulations provides as follows:

> "Whenever by reason of an error of fact or law an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any resulting hardship upon such individual." [9]

The adjustment of $200.00 per month from appellant's continuing compensation is proper inasmuch as appellant's monthly income exceeds his monthly expenses by $1,034.65 [10] and he has an additional cash resource base of $2,925.00. Accordingly, the Office in calculating the repayment schedule properly took into consideration the relevant factors cited under section 10.314: the probable extent of future payments, and the financial circumstances of the individual, so as to minimize any resulting hardship.

The September 15, 1986 decision of the Office of Workers' Compensation Programs is affirmed.

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[9] 20 C.F.R. section 10.314(a).

[10] Using appellant's net compensation of $1,350.50 each 28 days, he and his spouse have a monthly income of $4,032.50, which exceeds his listed monthly expenses by $984.48.

In the Matter of THOMAS DONAGHUE *and* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, CLEVELAND AIR ROUTE TRAFFIC CONTROL CENTER, Oberlin, Ohio

Docket No. 87-1951; Submitted on the Record;
Issued January 12, 1988

Before DAVID S. GERSON, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issues are: (1) whether appellant received an overpayment of compensation in the amount of $5,990.81 based on his receipt of compensation after he returned to work on May 27, 1984 and if so, whether he was without fault in creating this overpayment; (2) whether appellant's compensation was based on the proper rate of pay; and (3) whether appellant was entitled to a cost-of-living increase which was effective on July 1, 1977.

On December 17, 1975 appellant, then a 39-year-old air traffic control specialist, filed a claim for a stomach disorder and nervous tension which he attributed to the stress and strain of his air traffic control duties over the previous 17 and three-fourths years. Appellant stopped work on October 14, 1975, and used sick and annual leave until December 16, 1975 when he returned to his regular duties. The employing establishment's assistant regional flight surgeon found appellant temporarily medically disqualified on October 24, 1975 for air traffic control duties based on medications he was taking, but on November 6, 1975 found him medically qualified.

Appellant continued to work at his regular air traffic control duties until July 14, 1976 when the employing establishment's regional flight surgeon found him not qualified due to his nervous disorder. On July 14, 1976 the employing establishment assigned appellant to administrative duties. Appellant filed a claim for a recurrence of disability beginning that date; he claimed loss of the premium pay he had been earning while controlling air traffic.

The Office of Workers' Compensation Programs determined the amount of premium pay appellant had received for nights, Sundays, and holidays from July 12, 1975 to July 13, 1976 and based on his loss of premium pay paid him compensation beginning July 14, 1976.

On December 3, 1976 the employing establishment notified appellant of its determination to remove him from his air traffic control position. This determination was made final on December 28, 1976. Appellant filed an application for disability retirement, which was approved effective April 23, 1977, and enrolled in the employing establishment's second career training program.

On December 6, 1976 appellant requested that the employing establishment place him on leave without pay the following day. Appellant stopped work on December 7, 1976 and claimed compensation beginning that day.

The Office began paying appellant compensation for temporary total disability effective December 7, 1976, basing his rate of compensation on his rate of pay on July 14, 1976. On July 14, 1976 appellant's base rate (without premium pay) was $28,254 per year, the rate for a GS-13, step 8. On December 7, 1976 his base rate was $30,788, the rate for a GS-13, step 9.

By preliminary decisions dated June 17, 1983 the Office determined that appellant had received an overpayment of compensation in the amount of $2,967.23 which occurred because he received a cost-of-living increase of 4.9 percent effective July 1, 1977 to which he was not entitled, and an overpayment of compensation in the amount of $1,290.07 which occurred because he began working as a marketing coordinator on January 11, 1982 but received compensation for total disability until March 24, 1982. Appellant was determined to be without fault in the $2,967.23 overpayment, but at fault in the $1,290.07 overpayment.

Following a hearing held at appellant's request on March 27, 1984, an Office hearing representative, by a decision dated and made final on July 31, 1984 affirmed the Office's preliminary findings on the overpayments, and denied waiver of recovery of the overpayment for which appellant was found without fault. The hearing representative further found that appellant was not entitled to the cost-of-living increase effective July 1, 1977 on the basis that his disability began on July 14, 1976, less than one year before the effective date of the July 1, 1977 cost-of-living increase, and that appellant's compensation payments were properly based on his rate of pay on July 14, 1976, the date he began to lose premium pay and therefore the date his disability began.

On May 27, 1984 the employing establishment reinstated appellant as an air traffic control specialist at the rate of pay for a GS-14, step 8. This reinstatement was pursuant to an offer accepted by appellant on May 8, 1984, which advised appellant that if he accepted the position his compensation would be adjusted by the

Office. By an October 11, 1985 letter the Office advised appellant that he was not entitled to compensation after May 27, 1984 because his earnings were greater than the current rate of the position he held when injured.

By a preliminary decision dated December 10, 1986 the Office determined that appellant had received an overpayment in the amount of $5,990.81 which arose because he received compensation for temporary total disability until August 8, 1984 but was not entitled to compensation after May 27, 1984 when he returned to work. The Office further preliminarily determined that appellant was at fault in the creation of this overpayment because he knew or should have known he was not entitled to the checks he received after his return to work.

Following a hearing held at appellant's request on April 22, 1987, an Office hearing representative, by a decision dated June 29, 1987 and made final on July 2, 1987, found that appellant received an overpayment of compensation in the amount of $5,990.81 based on his receipt of compensation for total disability from May 27, 1984 when he returned to work until August 8, 1984, and that he was at fault in this overpayment because he knew he was receiving checks to which he was not entitled. The hearing representative further stated:

> "I have also considered counsel's arguments that the claimant has been underpaid because of the Office's use of an improper pay rate and note that this question was addressed at the previous hearing and a negative finding was made. I can see no basis for making a contrary finding."

The Board finds that appellant received an overpayment of compensation in the amount of $5,990.81 based on his receipt of compensation after he returned to work on May 27, 1984.

When appellant returned to work at the employing establishment on May 27, 1984 at a rate of pay greater than that of the position he held when injured, he was no longer entitled to compensation because he was no longer "disabled" within the meaning of the Federal Employees' Compensation Act.[1] Thus the amount of compensation he received from May 27, 1984 to August 8, 1984, when the Office terminated his compensation, is an overpayment of compensation. This amount is $5,990.81, as found by the Office.

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[1] In general the term "disability" under the Act means "Incapacity because of injury in employment to earn the wage which the employee was receiving at the time of such injury," *Thomas Olivarez, Jr.*, 32 ECAB 1019 at 1021 (1981) or inability because of an employment-related impairment to engage in the kind of work the employee was doing when injured. *David H. Goss*, 32 ECAB 24 (1980)

Section 8129(a) of the Act provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience." No waiver of overpayment is possible if the claimant is not without fault in helping to create the overpayment.

In determining whether an individual is "without fault," what constitutes "fault" depends on whether the facts show, among other things, that the incorrect payment resulted from:

> "(a) An incorrect statement made by the payee which the payee knew or should have known to be incorrect; (b) Failure of the payee to furnish information which the payee knew or should have known to be material; or (c) Acceptance of a payment which the payee either knew or should have been expected to know was incorrect." [2]

In the present case, the Office applied the third standard to appellant—acceptance of a payment which the payee either knew or should have been expected to know was incorrect—in finding appellant at fault in creating the overpayment.

After a careful review of the evidence, the Board finds that appellant was not "without fault" in receiving the overpayment in issue.

Not only did the employing establishment's offer of reinstatement, which was signed as accepted by appellant on May 8, 1984, advise him that his compensation would be adjusted by the Office if he accepted the offer and returned to work, but appellant had previously received an overpayment of compensation based on his receipt of compensation for total disability after he began to work. Under these circumstances appellant knew or should have been expected to know that the three compensation checks for total disability he received after he returned to work on May 27, 1984 were incorrect. Appellant was not "without fault" in helping to create the overpayment which therefore must be recovered. Even though the Office may have been negligent in issuing appellant these checks for total disability after it had been informed he had returned to work, this does not excuse appellant's acceptance of such checks which he knew or should have known were for an incorrect amount.[3]

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[2] Pursuant to *Califano v. Yamasaki*, 422 U. S. 682, 99 S. Ct. 2545, the Office established procedures to be followed in handling overpayment of compensation cases. These procedures are detailed in the Federal (FECA) Procedure Manual, Chapter 2-901 Overpayments, Part 2—claims.

The Board finds that the Office based appellant's compensation on an incorrect rate of pay.

Section 8101(4) of the Act, under which the Office determines an employee's rate of pay for the purpose of calculating compensation, states, in pertinent part:

> "'[M]onthly pay' means the monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than 6 months after the injured employee resumes regular full-time employment with the United States, whichever is greater."

In the present case appellant stopped work on October 14, 1975, returned to work on December 16, 1975, and performed his regular duties full time until July 14, 1976. When appellant was assigned to administrative duties on July 14, 1976 and began to lose premium pay for nights, Sunday, and holidays, he had a recurrence of compensable disability for which the Office paid him compensation for partial disability.

Appellant stopped work on December 7, 1976, and the Office began paying him compensation for temporary total disability on the date. As appellant's disability increased on December 7, 1976 from partial to total, he had a recurrence of disability within the meaning of the third alternative of section 8101(4) on December 7, 1976.[4] Thus the Office should have used his "monthly pay" on December 7, 1976 in calculating his rate of pay, if such pay is greater than that on the date of his recurrence of partial disability on July 14, 1976.

The Board finds that appellant is not entitled to the cost-of-living increase which was effective on July 1, 1977.

Section 8146a of the Act provides that "compensation payable on account of disability or death which occurred more than 1 year" before the effective date of a cost-of-living increase (determined in accordance with the provisions of the section) shall be increased by the percent of the increase.

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[3] *Robert W. O'Brien*, 36 ECAB 541 (1985).

[4] *Johnny A. Muro*, 19 ECAB 104 (1967).

The legislative history of this section, which was added in the 1966 amendments to the Act, makes it clear that the intent was to have cost-of-living increases apply only in situations where an employee has already been receiving compensation for more than one year prior to the effective date of the increase.[5] Contrary to the interpretation urged by appellant's attorney, this section was not intended to provide employees who have a recurrence of disability cost-of-living increases dating back to their initial period of disability, which could be many years earlier.

In the present case appellant's compensation began on July 14, 1976 and continued for more than one year. He is thus entitled to any cost-of-living increases effective after July 15, 1977 under section 8146a, but is not entitled to the cost-of-living increase that became effective on July 1, 1977.

The decision of the Office of Workers' Compensation Programs dated June 29, 1987 is affirmed insofar as it determined that appellant received an overpayment of compensation in the amount of $5,990.81 based on his receipt of compensation after he returned to work on May 27, 1984, that appellant was not "without fault" in the creation of this overpayment, and that appellant was not entitled to the cost-of-living increase which was effective on July 1, 1977. Insofar as it determined that appellant's rate of pay for calculating his compensation should be based on his "monthly pay" on July 14, 1976, the decision is set aside and the case remanded to the Office for the use of his "monthly pay" on December 7, 1976, if greater, to calculate his compensation payments.

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[5] For a further discussion of the legislative history of this section *see* *Franklin L. Armfield*, 29 ECAB 500 (1978).

In the Matter of JAMES C. HALL, SR. *and* DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, Philadelphia, Pa.

Docket No. 87-1983; Submitted on the Record;
Issued January 13, 1988

Before MICHAEL J. WALSH, GEORGE E. RIVERS, DAVID S. GERSON

The issues are: (1) whether appellant has more than a 30 percent loss of use of both of his lungs for which he received a schedule award on August 11, 1987; and (2) whether the Office of Workers' Compensation Programs correctly determined that the schedule award granted to appellant on August 11, 1987 should commence on October 14, 1986.

On January 9, 1985, appellant then a 46-year-old sandblaster, filed a notice of occupational disease and claim for compensation (Form CA-2), alleging that he contracted asthma and a sinus condition due to factors of his federal employment. Appellant alleged that he first became aware of this condition in 1983. He claimed compensation for wage loss for the period December 6, 1984 through January 7, 1985.

In support of his claim, appellant submitted a January 22, 1985 attending physician's report which diagnosed appellant's condition as "bronchial asthma" and indicated that this condition was caused or aggravated by appellant's employment as a sandblaster.

The Office of Workers' Compensation Programs referred appellant to Dr. Michael Unger, a Board-certified internist of professorial rank with a subspecialty in pulmonary disease, for examination and evaluation. Dr. Unger examined appellant on May 13, 1986 and, following this examination and a review of appellant's case file and a statement of accepted facts, submitted a report dated June 4, 1986 which incorporated the results of appellant's May 13, 1986 chest x-ray by Dr. William G. M. Ritchie, a Board-certified radiologist of professorial rank with a subspecialty in diagnostic radiology, and the results of appellant's pulmonary function tests performed on May 13, 1986.

In his report of June 4, 1986, Dr. Unger summarized his findings as follows:

"PULMONARY FUNCTION TESTS

"The patient underwent pulmonary function tests in our laboratory which showed moderate reduction in the FVC, [forced vital capacity] FEV_1; [forced expiratory volume in one second] FEV_1/FVC was low normal. The MVV [maximum voluntary ventilation] was also moderately decreased. The spirometric parameters flow improved somewhat after bronchodilators. Lung volumes showed severe increase of residual volume with moderate increase in the FRC [forced residual capacity of lungs]. The RV/TLC [residual volume/total lung capacity] was high above the predicted. The diffusing capacity was within normal limits. These results are suggestive of a rather restrictive pattern without an interstitial component with air trapping. The flow volume loops are consistent with the restrictive lung disease. However, the slightly increased TLC and increased RV/TLC ratio suggests severe air trapping.

"CHEST ROENTGENOGRAMS

"The patient also had chest roentgenograms done in our institution in PA, [posterior/anterior] lateral and both oblique positions. The films show, in the lateral projection, increased retrosternal space with somewhat flattened diaphragm and slight obliteration of the anterior costophrenic angle. On the PA and both oblique films, there is a suggestion of diffuse bilateral pleural thickening. The cardiac silhouette is within normal limits and there is no evidence of obvious parenchymal infiltrates, except, small granulomatous lesion in the left lung.

"SUMMARY

"In summary then, we are dealing with a 48-year-old male who has a subjective complaint of severe shortness of breath and was treated presumably for acute attack of asthma. His pulmonary function tests suggest, however, a restrictive pattern but also a significant air trapping which could be due to occlusion of the upper airways. The chest x-rays are also suggestive of possible pleural involvement which would explain the restrictive findings on the pulmonary function tests. The fact that there was some improvement in the flow parameters after bronchodilators suggests hyperreactivity of the airways. In response to your questions, it is my feeling that the patient might have had exacerbation of his respiratory problems due

> to exposure to dust particles and debris during the time he was working at the [employing establishment]. However, at the present time, he seems to be retired and the exposure ceased. In spite of this, he still seems to have his bronchospastic attacks.
>
> "To be able to assess the degree of responsiveness of those airways, the patient should be rechecked and pulmonary function tests should be repeated when he is optimally treated before and after bronchodilators. The specific cause of those attacks should be evaluated by close clinical follow up and if necessary, the appropriate testing. I do not think at the present time, methacholine challenge testing is of any value in this specific case. Of concern however, is the fact that the patient does have restrictive parameters documented on pulmonary function tests without obvious interstitial component. These could be due to pleural thickening related to exposure to asbestos.
>
> "My recommendation to [appellant] at the present time is abstention from exposure to any dust, dust particles or significant changes in the temperature or degrees of humidity and dryness of air. He should be followed on a regular basis and if necessary, should have a thorough ENT [ear, nose, throat] evaluation of the upper airways. He should also have readjustment of his medication and as mentioned before, have repeated pulmonary function tests when his situation is optimized."

By letter dated July 16, 1986, the Office asked Dr. Unger to comment, *inter alia,* on whether he believed the precipitation or aggravation of appellant's asthmatic attacks due to occupational exposure to dust had ceased by the date of the doctor's examination of appellant on May 13, 1986 or by possibly an earlier date, noting that appellant had retired on February 20, 1986.

In a letter dated July 22, 1986, Dr. Unger responded to this question as follows:

> "* * * [I]t would be rather unusual to have been exposed to some precipitating or aggravating factors of asthma at the work place and the same symptoms persist after removal from the environment. Since the patient claims to have had continuation of his symptoms even after cessation of work at the [employing establishment], it seems that if there is a precipitating factor, it is not strictly related to his working place."

On September 15, 1986, an Office medical adviser reviewed Dr. Unger's reports of June 4, 1986 and July 22, 1986 and based on the doctor's recommendation that appellant undergo additional pulmonary function tests when his "situation had optimized," referred appellant to Dr. Robert Grant of Pulmonary Disease Associates Ltd., an osteopath specializing in internal medicine (Ref: AOA 86-87 yearbook, pg. 389) for complete examination and evaluation.

Dr. Grant examined appellant on October 14, 1986 and in a report dated October 17, 1986, which incorporated the October 15, 1986 chest x-ray report of Dr. Robert D. Hochberg, a Board-certified diagnostic radiologist, and the results of the October 14, 1986 pulmonary function tests, stated his findings as follows:

> "Chest x-ray was evaluated revealing bilateral lateral wall pleural thickening of small degree with evidence of very small rounded opacities in the lower parenchymal lung fields left slightly greater than right. No pleural plaques of calcifications are noted.
>
> "Pulmonary function study reveals an FEV-1 of 56 percent of predicted before bronchodilator with a four percent improvement after bronchodilator. The FVC was 61 percent of predicted with a four percent improvement after bronchodilator. The FEF 25-75 revealed a 34 percent of predicted value with no change after bronchodilator and the FEV-1 percent was 73 percent of predicted. This spirometry is compatible with predominantly mild to moderate airflow obstructive disease with no significant improvement after bronchodilator. The patient is, however, on current long acting theophylline preparation as well as inhaled beta agonist and this may interfere with the degree of improvement in his airflow obstruction. The lung volumes were obtained revealing air trapping with a residual volume of 185 percent of predicted. The FRC is 129 percent of predicted and the diffusion capacity is 78 percent of predicted when corrected, for volume with a slow vital capacity of 55 percent of predicted.
>
> "*IMPRESSION*
>
> "I feel that this patient has predominantly obstructive airflow disease and I cannot establish a causal relationship to his occupation as adult onset bronchial asthma. In addition, I feel that he has pleural thickening most likely related to asbestos expo-

> sure in 1969–1972 as well as small amounts of parenchymal interstitial changes with interstitial disease as described. * * *"
>
> "I would recommend that he has yearly chest x-rays and no further exposure to asbestos."

On October 28, 1986, an Office medical adviser reviewed Dr. Grant's report of October 17, 1986 and the results of appellant's October 14, 1986 pulmonary function tests and, on the basis of the criteria set forth in the AMA *Guides,*[1] found that the FVC test indicated appellant had a Class 2 pulmonary impairment and the FEV-1 test indicated a Class 3 impairment. On the basis of the FEV-1 test, which indicated a greater degree of pulmonary impairment, the Office medical adviser found that appellant had a Class 3 impairment and determined that appellant had a 30 percent impairment to both of his lungs as a result of exposure to asbestos during the course of his federal employment. The Office medical adviser found, however, that appellant's current asthmatic condition was not employment related.

The Office accepted appellant's claim for "pleural thickening secondary to asbestos exposure and transitory precipitation of asthma."

By an award of compensation dated August 11, 1987, the Office awarded appellant 93.60 weeks of compensation based upon a 30 percent permanent impairment to both lungs. The period of the award ran from October 14, 1986, the date of Dr. Grant's examination of appellant, to July 30, 1988.

The Board finds that appellant has no more than 30 percent loss of use of both of his lungs.

The schedule award provisions of the Federal Employees' Compensation Act[2] and its promulgating regulations[3] set forth the number of weeks of compensation to be paid for permanent loss of use of the members of body listed in the schedule.[4] The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such a determination is a matter which rests in the sound discretion of the Office of Workers' Compensation Programs.

The Office has established guidelines for asbestosis claims and other types of pulmonary conditions.[5] These guidelines require that the medical reports used to determine the extent of any pulmonary disability include the following information:

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (2nd edition 1984); *see* Chapter 3.

[2] 5 U.S.C. section 8101 *et seq.*

[3] 20 C.F.R. Chapter 1, Subchapter B, Part 10.

[4] *See* 5 U.S.C. section 8107(c)(22); 20 C.F.R. 10.304(b).

[5] *See* Federal (FECA) Procedure Manual, *Occupational Illness*, Part 2—Claims, Chapter 2-806.18(f)(1), p. 51, FECA Tr. No. 81–44 (issued August, 1981).

> "Pulmonary Function Studies. Pulmonary function studies must include measurement of the following functions (the report of the results of the FVC, FEV_1, and Diffusing Capacity must include actual recorded values, the percent of predicted normal and identification of the normal standard applied for tests conducted before and/or after the use of bronchodilators). The studies should be performed under the supervision or direction of a Board-certified pulmonary specialist.
>
> "A. Forced Vital Capacity (FVC) and Forced Expiratory Volume in One Second (FEV) measured in liters and representing the best of three efforts; and the FEV_1/FVC ratio (FEV_1 percent) computed from these results. . .
>
> * * *
>
> "The report must be accompanied by appropriately labeled spirometric tracings (for all tests) showing distance per second on the abscissa and distance per liter on the ordinate."

The guidelines established by the Office for asbestosis claims suggest that the American Medical Association's *Guides to the Evaluation of Permanent Impairment,* be used to determine the percentage of pulmonary impairment.[6]

The AMA *Guides* has established a table consisting of four classes of respiratory impairment:[7] Class 1 (0 percent impairment) when tests of ventilatory function are above the lower limit of normal for the predicted value as defined by the 95 percent confidence interval; Class 2 (10–25 percent mild impairment) when tests of ventilatory function are below the 95 percent confidence interval but greater than 60 percent of the predicted value; Class 3 (30–45 percent moderate impairment) when tests of ventilatory function are less than 60 percent of the predicted value but greater than 50 percent predicted value for FVC, 40 percent predicted value for FEV–1, and 40 percent of the actual value for the FEV–1/FVC ratio; and Class 4 (50–100 percent severe impairment) when tests of ventilatory function are less than 50 percent predicted value for FVC, 40 percent predicted value for FEV–1 and 40 percent of the actual value for the FEV-1/FVC ratio. Under this table, if one of the three tests of ventilatory function, i.e., FVC, FEV-1 or the ratio, FEV-1/FVC, are abnormal to the degree described for Classes 2, 3 and 4 in rating pulmonary impairment, then the individual is deemed to have pulmonary impairment.[8]

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[6] The AMA *Guides to the Evaluation of Permanent Impairment* have been adopted by the Office and approved by the Board as a standard for evaluating scheduled losses. *See Samuel McGee,* 33 ECAB 1422 (1982); *Nelson Beals,* 34 ECAB 1243 (1983).

[7] *See* AMA *Guides,* p. 86 (2nd ed. 1984).

In the instant case, the record shows that Dr. Grant, an osteopath specializing in internal medicine, performed a complete and thorough examination of appellant in accordance with the Office's requirements for possible pulmonary disability and submitted a report which presents all the necessary findings.

Dr. Grant, in his pulmonary function tests, found that the FVC was 61 to 64 percent of the predicted value, the FEV-1 was 56 to 58 percent of the predicted value,[9] and the FEV-1/FVC ratio was 73 percent of the predicted value.

An Office medical adviser reviewed the results of these tests and, using the AMA *Guides,* found that the results of the pulmonary function tests placed appellant in Class 3 of respiratory impairment [10] and determined that appellant had a total of 30 percent impairment to both lungs.[11]

The Board finds that the Office applied the proper standards to the findings of Dr. Grant's October 14, 1986 pulmonary function studies in calculating a total of 30 percent impairment to both lungs.

Title 20 section 10.304(b) of the Code of Federal Regulations provides that for total, or 100 percent loss of use of one lung, an employee shall receive 156 weeks of compensation.[12] Accordingly, the amount payable for 30 percent loss of use of both lungs is, as the Office correctly determined, 93.6 weeks which is the product of 30 percent multiplied by 312 weeks (twice the award for loss of function of one lung.)[13]

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[8] *See* AMA *Guides,* p. 86 (2nd ed. 1984).

[9] As noted in Dr. Grant's October 17, 1986 report, the range in percentages of predicted values for the FVC and FEV-1 tests are due to testing of appellant before and after the administration of a bronchodilator in accordance with the AMA *Guides* which recommends that if wheezing or other evidence of bronchospasm is evident at the time of examination, the ventilatory studies should be done before and after the administration of a bronchodilator. *See* AMA *Guides,* p. 88 (2nd ed. 1984).

[10] The AMA *Guides* provide that only one of the ventilatory function tests must be abnormal to the degree described in Classes 2, 3 and 4 in order to have ratable pulmonary impairment. *See* AMA *Guides,* p. 84 (2nd ed. 1984). The Office medical adviser indicated that he used the results of the FEV-1 test which measured the greatest degree of pulmonary impairment of the three tests, FVC, FEV-1 and the FEV-1/FVC ratio. The AMA *Guides* further provide that "the spirogram indicating the best effort, either before or after administration of the bronchodilator, should be used to calculate the FVC and FEV-1." Accordingly, since the spirogram after use of the bronchodilator in the FEV-1 test yielded the better result, 58 percent of the predicted value, this is the determinative result of the FEV-1 test which places appellant in the lower range of Class 3 impairment.

[11] *See* FECA Program Memorandum No. 269 which provides that schedule awards for respiratory impairment will be based on the loss of both lungs.

[12] 20 C.F.R. section 10.304(b).

[13] *See* note 11, *supra.*

The Board further finds that the Office correctly determined that the schedule award should commence on October 14, 1986.

Appellant contends on appeal that the Office erred in determining that his schedule award should commence on October 14, 1986 because his pulmonary condition was diagnosed in May 1983.

It is a well-established principle that the period covered by a schedule award commences on the date that the employee reaches maximum improvement from the residuals of the employment injury [14] and not on the date the injury or disease is diagnosed or discovered as appellant contends. Maximum improvement means that the physical condition of the injured member of the body has stabilized and will not improve further. The determination of the date of maximum improvement is factual in nature and is based primarily on the medical evidence of record.[15]

In the instant case, the Office selected October 14, 1986 as the date of maximum improvement because that was the date of Dr. Grant's examination of appellant which formed the basis of the schedule award. Guidelines established by the Office support the use of such date in asbestosis and asbestosis-related claims.[16] These guidelines state that "the date of maximum medical improvement will be taken as the date of the examination which provided the results used for computation of the schedule award." [17]

The August 11, 1987 decision of the Office of Workers' Compensation Programs is hereby affirmed.

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[14] *See Marie J. Born*, 27 ECAB 623 (1976) and the citations set forth in footnotes 5 and 6.

[15] *James T. Rogers*, 33 ECAB 347 (1981).

[16] *See* note 5 *supra*.

[17] *Id.*

In the Matter of JOYCE Y. WESCOTT *and* DEPARTMENT OF THE ARMY, CIVILIAN PERSONNEL OFFICE, Oakland, Calif.

Docket No. 87-1924; Submitted on the Record;
Issued January 14, 1988

Before GEORGE E. RIVERS, DAVID S. GERSON, WILLIE T.C. THOMAS

The sole issue is whether the Office of Workers' Compensation Programs properly increased the amount of the withholding from appellant's continuing compensation payments from $75.00 to $131.00.

In 1972 appellant, then a 42-year-old accountant, filed a claim for compensation alleging that she fractured her lower back when a file cabinet fell on her. The Office of Workers' Compensation Programs accepted appellant's claim for hematoma of the left thigh and facet fracture of the lumbar vertebra L–4. Appellant was placed on permanent disability. She was paid compensation benefits based upon three-fourth of her salary, claiming her husband as a dependent on form CA–1032.

In a letter dated January 2, 1982 appellant notified the Office that she and her husband were divorced on December 28, 1981, and that she no longer claimed any dependents. The Office did not receive this letter until March 7, 1983, and continued to pay appellant her compensation benefits at the dependency rate through February 16, 1985.

During the summer of 1984 appellant went into a coma and a conservator was appointed to handle her affairs. The record is not clear if/when appellant came out of a coma, but appellant is still incapable of handling her own affairs, and the conservatorship is still in effect.

By letter compensation order dated March 8, 1985 the Office informed appellant's conservator that a preliminary determination had been made that appellant received an overpayment of compensation in the amount of $6,370.71. The overpayment occurred because she was in receipt of compensation at the three-fourths dependency rate when she no longer had a dependent as of December 29, 1981, the date her divorce was finalized. A preliminary finding was made that she was not without fault with respect to the overpayment because she was aware by virtue of the dependency and employment questionnaire, CA–1032, that she was entitled to compensation at three-fourths rate only if she had a dependency as identified on the form.

In a letter dated May 10, 1985 appellant's conservator requested a waiver of the overpayment of compensation based upon the fact that appellant notified the Office, by letter dated January 2, 1982, that she was divorced and no longer entitled to the dependency rate of compensation.

By letter compensation order dated June 20, 1985 the Office finalized its preliminary determination of an overpayment in the amount of $6,370.71, and declared that appellant was not without fault with respect to the overpayment. A sum of $75.00 was withheld from appellant's continuing compensation payments effective July 7, 1985 until the overpayment was absorbed.

By letter dated November 17, 1986 appellant's conservator notified the Office that appellant was confined to a convalescent hospital which required that all of her income money be paid to the hospital for her care. The Welfare Department paid the balance of the expenses for her medical care.

By letter decision dated June 17, 1987 the Office increased the amount of the withholding to $131.00. The Office based its decision on FECA Bulletin No. 87-19 which stated that in all overpayment cases the minimum acceptable offset against continuing benefits was ten percent of each scheduled payment. As appellant's current compensation each four weeks was $1,305.02, ten percent of this was $131.00.

By letter dated July 8, 1987 appellant's conservator stated that appellant's only source of income was the $1,305.02 she received in compensation payments, and that all of that money, except $35.00 per month, was paid to the convalescent hospital for her care, and that the Shasta County Welfare Department under the Medi-Cal program paid the difference from what her income was and the amount of the total expense for the medical care provided. This was an average of $2,000.00 to $2,200.00 per month. The conservator concluded: "as you can see from this, the funds you have been deducting and your attempt to deduct a greater amount has created and will create an additional hardship for this lady."

On September 8, 1987 appellant's conservator filed an appeal of the Office's decisions dated June 20, 1985 and June 17, 1987.

The only decision before the Board on this appeal is whether the Office properly increased the amount of the withholding from appellant's continuing compensation payments from $75.00 to $131.00. Since more than one year has elapsed from the date of the issuance of the Office's June 20, 1985 decision to the date of the filing of appellant's appeal on September 8, 1987, the Board lacks jurisdiction to review that decision.[1]

The Board further finds that this case is not in posture for decision.

The Office increased the amount of appellant's withholding from $75.00 to $131.00 based upon FECA Bulletin No. 87-19 which states that in all overpayment cases the minimum acceptable offset against continuing benefits will be ten percent of each scheduled payment. However, the Office failed to consider 20 C.F.R. section 10.321(a) in its decision. 20 C.F.R. section 10.321(a) states:

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[1] 20 C.F.R. 501.3(d)(2); *Nicholas Gatto*, 25 ECAB 300 (1974).

> "Except for an overpayment resulting from forfeiture of previously paid compensation, such as provided in section 10.125, whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any resulting hardship upon such individual. * * *"

While appellant's conservator stated that increasing the withholding would create an additional hardship for appellant, the Office did not attempt to develop the evidence to determine the effect of the increased withholding on appellant. The Office did not consider the extent of appellant's financial expenses and obligations and the effect of the additional withholding on those obligations. In addition, the Office did not develop the evidence to determine whether/how appellant's treatment at the convalescent hospital would change as a result of the $131.00 withheld from each scheduled payment. Appellant's conservator stated that Welfare paid the balance of appellant's medical expenses. However, appellant may have expenses which Welfare has determined are not medical, are therefore not covered by Welfare, and have to be paid for by appellant. FECA Bulletin No. 87-19 does not allow the Office to ignore the provisions of 20 C.F.R. section 10.321(a) in insuring that recovery of an overpayment is made to minimize any resulting hardship upon the claimant.

On remand the Office must further develop the case record to determine the effects of the $131.00 withholding on appellant's financial obligations as well as the effects, if any, on her treatment at the convalescent hospital.

The decision of the Office of Workers' Compensation Programs dated June 17, 1987 is hereby set aside and the case remanded for a *de novo* decision and further development of the record consistent with this decision.

In the Matter of LARRY KNOKE *and* U.S. POSTAL SERVICE, POST OFFICE, Toledo, Ohio

Docket No. 86-2122; Submitted on the Record;
Issued January 15, 1988

Before DAVID S. GERSON, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether appellant was an employee of the United States within the meaning of 5 U.S.C. section 8101(1)(B) of the Federal Employees' Compensation Act at the time of his injury.

On August 8, 1985 appellant, then 27 years of age, filed a notice of occupational disease and claim for compensation alleging that he sustained a sprain of his left hand with possible nerve damage to the third finger of the left hand. Appellant indicated that the injury occurred on June 6, 1985 while he was operating a letter sorting machine. He listed his occupation as a free lance artist (self-employed). On the reverse of the claim form, the employing establishment training and development specialist indicated that appellant was not employed by the agency and that appellant's status was as a "trainee." It was also noted that appellant received medical treatment on June 7, 1985.

In a statement dated August 8, 1985 appellant noted that for the period May 30, 1985 through June 7, 1985 he was engaged in an 18-hour manual dexterity test from 12:30 a.m. to 2:00 a.m. in order to qualify for the position of letter sorting machine operator. He indicated that on the morning of June 6, 1985 the cards in the letter sorting machine were moving faster and faster and he tried to move his fingers of his left hand to stay ahead of the accelerating cards. Appellant stated that at this time he felt a muscle cramp in the base of the third finger of his left hand and that he continued to work at the keyboard. He noted that he was informed that an instructor had been increasing the speed on the letter sorting machine as part of the test. Appellant stated that he returned home and that his left hand became swollen and he was unable to finish the test session on June 7, 1985. He noted that he received medical attention later that morning.

In a memorandum dated June 7, 1985 the employing establishment letter sorting machine trainer noted that appellant had developed a bad cramp in his hand on June 6, 1985 but continued to key. On June 7, 1985 appellant returned for further testing and the top of his hand was black and blue. After 15 minutes appellant was asked to leave and seek medical attention.

The employing establishment submitted records which indicate that appellant was enrolled in a Post Office Individual Training course in order to qualify for a position in mail processing. Medical records were also received which indicate appellant was treated on June 7, 1985 at the Maumee Urgent Medical Care Center. The report noted a history of injury as related by appellant and diagnosed a sprain of the left third finger. X-rays of the finger were obtained and did not reveal any fracture. Appellant returned to the Center for further treatment on July 9, 1985 and was found to have an unresolved soft tissue injury of the left third finger with numbness. Appellant was referred for evaluation to Dr. Steven F. Habusta, an osteopath, who obtained a history of injury and noted a limitation of motion on extension. He stated:

> "I am somewhat confused of the etiology of this, I am questioning why both flexion and extension would be involved. I think that there is a good possibility that he has either ruptured a lateral band on the ulnar side of the finger, or a portion of the extensor mechanism of the finger. There may also have been neurovascular injury at the time to the neurovascular bundle on the ulnar side. Whether or not this resolves completely remains to be seen."

By letter dated October 31, 1985 the Office of Workers' Compensation Programs requested further information from appellant with regard to his employment with the employing agency. The Office inquired as to whether appellant accepted an offer of employment from the employing establishment; whether such agreement was verbal or written; whether appellant was required to take an oath of office; the nature of the work performed; and whether pay for work performed was accrued.

By letter dated November 6, 1985 appellant responded that he had attended a preemployment interview on May 28, 1985 and at that time arrangements were made for training on the letter sorting machine. Appellant indicated that he was verbally informed that if, after 18 hours of training, he could type three numbers on 200 test cards at the rate of 60 cards per minute with less than 10 mistakes, he would be allowed to continue training. He also noted that no oath was administered and no payment was involved. Appellant also submitted a preemployment training memorandum with a signed statement of understanding as to the employing establishment hiring policy.

By letter compensation order dated January 8, 1986 the Office rejected appellant's claim finding that at the time of injury he did not have the status of an "employee" of the employing establishment. The Office found that appellant was not a civil employee of the United States and therefore not entitled to coverage under the Federal Employees' Compensation Act at the time of injury.

The Board finds that appellant was not a civil employee of the United States under section 8101(1) of the Federal Employees' Compensation Act at the time of his injury on June 6, 1985.

Section 8101(1) of the Act defines "employees" for purposes of determining entitlement to benefits under the Act.[1] With regard to whether a claimant is a federal employee for purposes of the Act, the Board has noted that such a determination must be made considering the particular facts and circumstances surrounding his or her employment.[2] Among the factors to be considered in determining who is an "employee," the Board has considered whether the claimant, although not paid, has been "rendering service similar to the service of a civil employee" and whether the employing agency was authorized by statute to accept such services.[3]

In the present case, the Board finds that appellant was undergoing preemployment testing at the employing establishment in order to become eligible for employment.[4] At the time of his injury, appellant was receiving no pay from the employing establishment, he was providing no identifiable service or benefit to the potential employer while taking the test, and he had received no guarantee of employment upon successful completion of the test session. Instead, the record indicates that appellant was taking the test for his own benefit in order to qualify for employment among a pool of participants in the employing establishment's preemployment program. Appellant's activities on June 6, 1985 were not sufficient to establish that he was an employee of the United States within the meaning of the Federal Employees' Compensation Act.

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[1] 5 U.S.C. section 8101(1). Subsection (B) of the Act includes as an "employee" an individual rendering personal services to the United States similar to the service of a civil office or employee of the United States without pay or for nominal pay, when a statute authorizes the acceptance of use of the service, or authorizes payment of travel or other expenses of the individual.

[2] *John V. Allcock*, Docket No. 85-1064 (issued June 20, 1985); *Wendy S. Warner*, 38 ECAB 103 (1986).

[3] *See George Abraham (Anne Abraham)*, 36 ECAB 194 (1984).

[4] In *Sellers v. City of Abbeville*, 458 So. 2d 592 (La. App. 1984), the plaintiff was injured while warming up for a physical agility test required of applicants for the position of police officer. In finding that the plaintiff was not an employee at the time of his injury, the court noted that no wages had been paid to job applicants and that plaintiff was not rendering services for the City by taking the test.

The January 8, 1986 decision of the Office of Workers' Compensation Programs is affirmed.

In the Matter of **Wayne O. Roberts** *and* U.S. **Postal Service, Post Office**, Glens Falls, N.Y.

Docket No. 88-105; Issued January 19, 1988

ORDER DISMISSING APPEAL

Before **Michael J. Walsh, George E. Rivers, David S. Gerson**

On October 5, 1987 appellant filed an application for review of a July 22, 1987 decision of the Office of Workers' Compensation Programs which rejected appellant's claim on the ground that he failed to establish the essential elements of his claims.

The Board has duly considered the case record and notes that the Office issued a decision dated October 2, 1987 in which it vacated the July 22, 1987 compensation order and approved appellant's claim. Under the Board's *Rules of Procedure,* only a "person adversely affected by a final decision of the [Office] may file an application for review of such decision by the Board."[1] As the Office has vacated the July 22, 1987 compensation order and accepted appellant's claim, he is no longer "adversely affected" by the Office's July 22, 1987 decision. For this reason the appeal docketed as No. 88-105 will be dismissed.

IT IS ORDERED that the appeal docketed as No. 88-105 be dismissed and the case record returned to the Office of Workers' Compensation Programs.

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[1] *See* 20 C.F.R. section 501.3(a).

In the Matter of WILLIAM C. AUSTIN *and* DEPARTMENT OF THE NAVY, NAVY PUBLIC WORKS, Pearl Harbor, Hawaii

Docket No. 87-1371; Submitted on the Record;
Issued January 25, 1988

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant forfeited his right to compensation for the period November 13, 1980 through February 23, 1983 because he failed to report earnings from self-employment under section 8106(b) of the Federal Employees' Compensation Act; (2) whether the Office properly determined that appellant was not "without fault" with respect to the resulting $41,937.35 overpayment of compensation and that therefore the overpayment was not subject to wavier; and (3) whether the Office properly terminated appellant's compensation effective February 23, 1983.

On June 18, 1979 appellant, then a 33-year-old crane operator, was getting on a crane when he slipped, catching himself to avoid a fall. He developed minor pain in his lower back which subsequently became more severe.

Appellant stopped working on June 21, 1979, returned on June 25, 1979 for part of a day, then stopped again. He received continuation of pay for the period he did not work until August 4, 1979. The Office of Workers' Compensation Programs accepted that appellant had a low back strain and began payment of temporary total disability compensation.

In an October 17, 1979 letter, the Office informed appellant that he was being placed on the automatic roll for compensation. The Office instructed appellant that if he returned to his former job or obtained other employment he should inform the Office at once. The Office stated that if appellant was self-employed he must report as pay what it would have cost to hire someone else to do the same work. The Office informed appellant that any compensation checks he received after he resumed work must be returned to the Office.[1]

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[1] The case record submitted on appeal does not contain this letter, a CA-1049 form, or two subsequent CA-1049 forms. The record shows however, that the letters were sent, and at least the first letter was received by appellant.

The Office referred appellant to a private vocational rehabilitation service. In a February 28, 1980 report, a vocational consultant indicated that appellant was proceeding with a business venture with two partners to open an amusement center on April 1, 1980.

Appellant returned to work on April 1, 1980 but stopped working on April 3, 1980. He worked intermittently thereafter until November 13, 1980 when he stopped working. The Office paid temporary total disability compensation for the periods appellant did not work and did not take leave and for the period beginning November 13, 1980.

In a December 16, 1981 letter (Form CA-1032) the Office instructed appellant to report any and all employment and pay or earnings for the prior 12 months or since his last report of employment and pay or earnings was submitted to the Office. The Office informed appellant that if he did not work for others but was self-employed he must report the employment and show as a rate of pay what it would have cost to hire someone else to do the same work.

In a March 16, 1982 telephone conversation an Office claims examiner discussed with appellant's rehabilitation consultant the necessity of completing and returning the CA-1032 to avoid suspension of compensation. Appellant signed the form on March 16, 1982 and, in the space for reporting employment, including self-employment, wrote "N/A."

In an October 28, 1982 CA-1032 letter, the Office again instructed appellant to report all employment and pay or earnings for the past 12 months. Appellant signed the form on December 17, 1982 and again wrote "N/A" in the space for reporting employment.

In a March 9, 1983 memorandum, an investigator for the Office of the Inspector General reported that on November 13, 1980 appellant filed applications for an excise license and fictitious name for a video game business, identifying himself as the sole proprietor. The investigator stated appellant filed a deposition in a legal dispute over rent in which he stated that he was the sole proprietor of the business; had a gross income from the business of $2,000 or $3,000 a month; had a management agreement with the shopping center in which his business was located that provided free rent, worth $4,000 a month in exchange for managing the shopping center, and handling maintenance, complaints and security. The investigator indicated that interviews with 10 police officers who performed work for appellant, a former employee and several people who had business dealings with appellant, stated that appellant was actively employed in the business, represented himself as owner and operator of the business and commented that he was doing well financially. The investigator reported that two special agents from the Naval Investigator Service spent three hours at appellant's business observing him selling tokens and assisting patrons including the two special agents.[2]

In an April 5, 1983 decision, the Office terminated appellant's compensation effective February 24, 1983 on the ground that he was engaged in employment from which he had received income since November 1980 that he had not reported to the Office as required. The Office informed appellant that as a result of the unreported employment an overpayment of compensation had occurred since November 1980. The Office instructed appellant to list all employment since November 1980, reporting the amount of income received from that time to the time of the decision. The Office stated that after receiving the information, it would compute the amount of the overpayment to be recovered.

In an August 8, 1986 preliminary decision, the Office found that appellant had received an overpayment of $41,937.25 which occurred because he was self-employed and received compensation simultaneously for the period November 13, 1980 through February 23, 1983. The Office stated that a preliminary finding had been made that appellant was at fault in the matter because he was aware or should have been aware that he could not receive wage loss compensation for total disability while gainfully employed. The Office indicated that the letter was not a final decision. The Office informed appellant that he had the right to submit evidence or arguments if he disagreed with the amount of the overpayment, disagreed that the overpayment occurred or believed that the overpayment occurred through no fault of his own. The Office also informed appellant of his right to request a prerecoupment before an Office hearing representative on the issue of the overpayment.[3]

Appellant requested a hearing before an Office hearing representative. At the September 18, 1986 hearing appellant testified that he was last gainfully employed at the time of his injury. He stated that he had been totally disabled since his employment injury. He indicated that the arcade business did not generate a net profit. He testified that his wife operated the business. Appellant contended that an Office claims examiner instructed him to put "N/A" on the CA-1032 form. He stated that in a telephone conversation, the claims examiner asked him if he had earned any money for the past 12 months. Appellant testified that he did not tell the claims examiner that he had not earned any money. Appellant's attorney contended that, as appellant was totally disabled, he had no duty under 5 U.S.C. section 8105 to complete a form to report earnings and employment. He stated that the duty arose only under 5 U.S.C. section 8106 in regard to partially disabled claimants.

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[2] Appellant was tried and convicted on two counts of making a false statement to the government and one count of mail fraud. He was sentenced to two years imprisonment on each count, to be served concurrently.

[3] In an August 21, 1984 letter the Office refused to pay an $81.00 medical bill because the services were not authorized by the Office. In a September 9, 1984 letter appellant requested a hearing on the denial of medical benefits in the August 21, 1984 letter decision. A hearing was scheduled for September 25, 1985 but was cancelled because appellant was unable to attend. The hearing on this issue has not been rescheduled and the Office has not made a subsequent decision on the issue of medical benefits.

In a January 21, 1987 decision, the Office hearing representative found that appellant had received a $41,937.35 overpayment of compensation. He stated that appellant's conviction for filing false CA-1032 forms was tantamount to a finding of fault due to issuance of an incorrect statement by appellant which he knew or should have known to be incorrect. He therefore concluded that appellant was not without fault in the overpayment. He further found that the record the Office properly established that appellant should forfeit compensation from November 13, 1980 through February 23, 1983.

In the case record and on appeal appellant alleges that he had been determined by the Office to be totally disabled and therefore was not required to file earnings reports with the Office and not subject to the forfeiture provisions governing misstatement of earnings; and since he received benefits for temporary total disability effective 1979 through 1980, he was not subject to the forfeiture provision. Appellant cited 5 U.S.C. section 8106(b) and 20 C.F.R. section 10.110, respectively, which refer to a "partially disabled employee." He then argued that *United States v. Dorey,* 711 F. 2d 125 (9th Cir. 1983) was dispositive on the issue.

Section 8106(b) states the following:

> "The Secretary of Labor may require a partially disabled employee to report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times the Secretary specifies. The employee shall include in the affidavit or report the value of housing, board, lodging, and other advantages which are part of his earnings in employment or self-employment and which can be estimated in money. An employee who: (1) fails to make an affidavit or report when required; or (2) knowingly omits or understates any part of his earnings forfeits his right to compensation with respect to any period for which the affidavit or report was required. Compensation forfeited under this subsection, if al-

> ready paid, shall be recovered by a deduction from the compensation payable to the employee, or otherwise recovered under section 8129 of this title [recovery of overpayments], unless recovery is waived under that section."

5 U.S.C. section 8105 provides:

> "(a) If the disability is total, the United States shall pay the employee *during the disability* monthly monetary compensation equal to 66⅔ percent of his monthly pay, which is known as basic compensation for total disability." (emphasis added)[4]

Further, 20 C.F.R. 10.110 which was applicable at that time (it is now 10.125) stated the following: "Affidavit or report by employee of employment and earnings."

> "The Office may require a partially disabled employee to submit an affidavit or other report as to his or her earnings either from employment or self-employment. If such individual, when required, fails within a reasonable time to submit such affidavit or the employee knowingly omits or understates any part of such earnings or remuneration such employee shall forfeit his or her right to compensation with respect to any period for which such affidavit or report was required to be made, and any compensation already paid may be recovered by deducting the amount thereof from compensation payable to him or her or otherwise according to law. Earnings from employment referred to in this section or elsewhere in this part means gross earnings or wages before any deductions whatsoever have been taken out of such wages, and include the value of subsistence, quarters, or other advantages received in kind as part of the wage or remuneration. In general, earnings from self-employment means the rate of pay the employee estimates it would cost him or her to have someone else perform the work the employee is performing."

The facts in *Dorey* and the instant case are essentially identical. In both cases the employee was administratively determined by the Department of Labor to be totally disabled within the meaning of the Federal Employees' Compensation Act. Both employees were provided questionnaires and requested to report any employment and wages for a specified time and period during which they were receiving temporary total compensation benefits. Each employee reported they had no employment or earnings when in fact it was ascertained they had been self-employed.

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[4] 5 U.S.C. section 8106(b); 5 U.S.C. section 8105.

The similarities in the cases, however, cease at this point. *Dorey* was criminally indicted for violating 18 U.S.C. section 1001 and 1920 a criminal statute for the "making of a false affidavit or report required by section 8106 of Title 5, United States Code. The proceeding in the instant case is a review from an administrative determination, noncriminal in nature, which found appellant had forfeited compensation for falsely reporting that he had no earnings during aforementioned specified times. The U.S. Court of Appeals for the Ninth circuit in fact, notes this distinction in its decision and acknowledges that the Department of Labor may have "valid administrative reasons to give section 8106 a construction which can justify reading the word partially to mean totally." The Court pointed out that the due process clause requires fair warning of conduct which is considered criminal and would subject him to such prosecution. Although the Court found that 5 U.S.C. section 8106 and 18 U.S.C. section 1001, when read together, do not provide adequate warning to individuals declared temporarily totally disabled that they must truthfully report their employment earnings, the Court specifically limited their finding to cases where the appellant was indicted on criminal charges based on sections 8106 and 1001 of their respective Titles. The Court excluded application of its interpretation in purely administrative determination that total disability can be construed as partial disability in certain administrative contexts nor did it specifically address those situations where such construction is appropriate or inappropriate in cases under the Federal Employees' Compensation Act before the Department of Labor. Therefore, the *Dorey* case is not dispositive on the issue in this civil case under a civil penalty, presently before the Board.[5]

The Board has provided reasoning for its construction of sections 8106 and 8105.[6] If an employee is in fact totally disabled, normally he would not have any employment earnings to report and a provision regarding such earnings would be meaningless. The provision regarding reporting and forfeiture has relevance only with respect to periods of partial disability where an employee receiving compensation might also be engaged in employment. Therefore, the test is whether, for the time period under consideration, the employee was, *in fact*, totally disabled or merely partially disabled, and not whether he received total disability compensation for that period.[7]

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[5] *Elbridge H. Wright*, 36 ECAB 691 (1985); *James M. Davis*, 37 ECAB 344 (1986); *James F. DiNallo*, Docket No. 85–489 (issued September 30, 1986).

[6] *Ronald H. Ripple*, 24 ECAB 254 (1972).

As stated in *Ripple,* it is not relevant under the circumstances in the case that the Office did not make a formal decision changing the employee's compensation status from one of total disability to that of partial disability. Appellant's false reports regarding his employment status kept important information from the Office which would have clearly shown that he was only partially disabled. The test is whether appellant was, in fact, only partially disabled, and the evidence establishes that he was.

The record shows that appellant was instructed by the Office to report any return to his former job or any of his employment including self-employment. He was instructed to return any compensation checks received after his return to work. He was requested by letters dated December 16, 1981 and October 28, 1982 to report any earnings and employment in the prior 12 months or since his last report of earnings. Appellant therefore was well aware of the requirement to report any return to work or self-employment.

The investigative report, based on the observation of two special agents and a thorough review of relevant documents shows that appellant was self-employed in running a video arcade business from November 13, 1980, the day he stopped working for the employing establishment. Appellant contended that the business was operated by his wife. The investigative report however shows that appellant was actively involved in the operation of the business. Appellant's work at the video arcade shows that he was physically able to perform remunerative work and therefore that he was not totally disabled but partially disabled. Although appellant consistently denied having performed work in any of the video arcades and attributed the work performed to his wife, the credible evidence of record rests with the observations made by the investigators and report of numerous witnesses contracted by the investigators. As he was partially disabled, appellant was required to report his self-employment and the earnings he would have paid someone else to perform the duties that he performed.

Appellant contended that the video arcade business did not produce a net profit during the time of its operation. This reason, however, has not been accepted by the Board as reasonable justification for the failure to report employment or earnings to the Office as required.[8]

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[7] *Elbridge H. Wright, supra.*

[8] *William H. Higgins,* 34 ECAB 33 (1983); *David Martian,* 35 ECAB 1144 (1984); *James R. Hall,* Docket No. 86-1291 (issued February 27, 1987).

The Board therefore finds that appellant was subject to the forfeiture provisions of section 8106(b) of the Act for the period from November 13, 1980 through February 23, 1983 because of his failure to report earnings as required by this section.[9]

With respect to the issue of fault in the creation of the overpayment, the Board finds that the weight of the evidence establishes that appellant was not "without fault."

The Federal Employees' Compensation Act, 5 U.S.C. section 8129(b), provides for waiver of overpayment under the following conditions: "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience." No waiver of overpayment is possible under the Act if the claimant is not without fault.

In determining whether an individual is "without fault," what constitutes "fault" depends on such circumstances as whether the facts show the incorrect payment resulted from the following:

> "(a) An incorrect statement made by the payee which the payee knew or should have known to be incorrect; (b) Failure of the payee to furnish information which the payee knew or should have known to be material; or (c) Acceptance of a payment which the payee either knew or should have been expected to know was incorrect." [10]

In the present case, it is apparent that the Office applied the second standard—failure of the payee to furnish information which the payee knew or should have known to be material—in finding appellant at fault in creating the overpayment.

The case record shows that appellant was instructed to report any return to his former job or other employment immediately, including any self-employment. The record also shows that appellant was sent two CA-1032's on December 16, 1981 and October 28, 1982 requiring him to report his earning for the prior 12 months or since his last report. Appellant did not report that he was self-employed. He indicated on both CA-1032 forms that the questions relating to employment and earnings were not applicable to him, even though the forms instructed him to report self-employment. In failing to report his self-employment appellant failed to furnish information which he knew to be material, and was not "without fault" in creation of the overpayment. Accordingly, no waiver of the overpayment under 5 U.S.C. section 8129(b) is possible.

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[9] Appellant's attorney argued on appeal that the only basis for requiring appellant to file an earnings statement was in the Federal (FECA) Procedure Manual, Chapter 2-807(7). He contended that as the manual had not been adopted in accordance with Administrative Procedures Act, the manual did not have the force of law or rule and was invalid. As the Board has explained how 5 U.S.C. section 8106(b) applies in this case, it is not necessary to discuss whether the Administrative Procedures Act applies or should apply to the Federal (FECA) Procedure Manual.

[10] Federal (FECA) Procedure Manual, Chapter 2-901, Developing and Monitoring Payments, Part 2-claims. Pursuant to *Califano v. Yamasaki*, 422 U.S. 682, 99 S. Ct. 2545, the Office established procedures set forth in the Procedure Manual to be followed in handling overpayment of compensation cases.

The Board finds, however, that the Office improperly terminated appellant's compensation effective February 23, 1983.

The Office may terminate or suspend compensation benefits only under certain specified circumstances: when a claimant refuses an offer of suitable employment;[11] when the Office establishes that the disability for which compensation has been paid has ceased or is not causally related to his employment injury;[12] under section 8131(b) of the Act when a claimant refuses to assign or prosecute an action in his own name when required by the Secretary;[13] and under section 8123 of the Act when a claimant fails to undergo or obstructs an examination.[14] The Office, in this case, did not suspend or terminate appellant's compensation on any of the foregoing grounds. The only reason for the Office's termination of compensation was the fact that appellant had been working while receiving temporary total disability compensation. The Act does not provide that compensation can be terminated in such circumstances. The Office should have developed the record further to determine whether appellant's disability due to the employment injury had ceased or whether appellant had a loss of wage-earning capacity based on his actual earnings. In either situation the Office had the burden of proof.[15] The Office has not yet met this burden in terminating appellant's compensation, effective February 23, 1983. Appellant therefore remains entitled to compensation for the period after February 23, 1983.[16]

The decision of the Office of Workers' Compensation Programs dated January 21, 1987 is affirmed; the decision of the Office dated April 5, 1983, which terminated compensation effective February 23, 1983, is hereby reversed.

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[11] 5 U.S.C. section 8106(c).

[12] *James R. Dorris*, 30 ECAB 979 (1979).

[13] *See* 5 U.S.C. section 8131(b).

[14] 5 U.S.C. section 8123(b).

[15] *Raymond E. Romeo*, 34 ECAB 1010 (1983); *Ella M. Garner*, 36 ECAB 235 (1984).

[16] The Office may consider offsetting the above entitlement against the overpayment caused by the forfeiture. In the event the Office on further development of the record subsequently finds that appellant was not totally disabled after February 23, 1983, some of all of this entitlement may be subject to recovery under section 8129 of the Act.

In the Matter of NINO V. DIGREZIO *and* DEPARTMENT OF THE NAVY, BOSTON NAVAL SHIPYARD, Boston, Mass.

Docket No. 87-943; Submitted on the Record;
Issued January 26, 1988

Before GEORGE E. RIVERS, DAVID S. GERSON, MICHELE VON KELSCH

The issue is whether appellant has a disabling pulmonary condition causally related to his exposure to asbestos in his employment.

On July 13, 1978 appellant, then 60-years-old, filed a claim for asbestosis which he attributed to his exposure to asbestos in his employment as an electrician at the employing establishment from August 1940 to April 1953.

Appellant submitted a March 3, 1978 report from Dr. Michael B. Zack, who is Board-certified in pulmonary disease, stating that when he first saw appellant his impression was pleural effusion secondary to asbestosis, that he had a FEV-1/FVC ratio of 51 percent, that his x-rays showed a slight calcification on the diaphragmatic pleura, that appellant had dyspnea with significant exertion, that his findings were consistent with asbestosis, and:

> "It is my impression that this patient has radiographic evidence of asbestosis as well as clinical. He has some residual lung dysfunction which in part is referable to his thirty pack years of smoking but may well also represent occupational lung disease. It is my impression that there is probable sufficient evidence to diagnose clinically his pulmonary condition as asbestosis."

In a June 22, 1978 report on a form of the Office of Workers' Compensation Programs Dr. Zack set forth findings of pulmonary function testing done on June 15, 1978, diagnosed probable benign pleural effusion secondary to asbestos and chronic obstructive pulmonary disease secondary to smoking, and stated "Possibly dyspnea secondary to asbestos but 30-pack years of smoking can account for most of symptoms as well as objective pulmonary function testing abnormalities" and "He may get dyspneic with heavy work but should have no limitations with light work."

Appellant submitted records regarding his treatment for pulmonary conditions from 1972 to 1974, showing examinations and treatment for pneumonia, bronchitis, chronic obstructive pulmonary disease, and pleural effusion.

In a June 12, 1979 report Dr. Zack stated that it was not at all unlikely that appellant's asbestosis was related to his employment at the employing establishment, that an April 30, 1979 pulmonary function test and a May 1, 1979 x-ray were unchanged since previous studies, and "While there is nothing diagnostic in his chest x-ray to support a diagnosis of asbestosis, I think the most likely source of the pleural effusion he sustained in this nontuberculin positive patient, is probably benign pleural effusion in an asbestos exposed individual."

In a November 6, 1980 report Dr. Zack stated that appellant's April 4, 1980 pulmonary function testing indicated a severe obstructive defect, although his arterial blood gases and diffusing capacity were normal, and:

> "It remains my impression, as I indicated in a letter to you of March 3, 1978, that this patient has radiographic evidence of asbestosis. Part of his lungs function could be due to his 30 pack years of smoking but could also represent occupation lung disease as well.
>
> "There has been some worsening of his expiratory flow rates as compared with our previous pulmonary function tests of last year. This could represent either asbestos lung involvement or progression of obstructive lung disease."

On May 1, 1981 an Office medical adviser reviewed the medical evidence and stated that appellant has asbestos-related pleural calcification and effusion.

By a compensation order dated June 29, 1981 the Office rejected appellant's claim on the basis that it was barred by the time limitations of the Federal Employees' Compensation Act. Appellant appealed this decision to the Board, which by a decision dated June 30, 1982 found that the claim was timely filed and reversed the Office's decision.[1]

By a letter dated August 17, 1982 the Office advised appellant that it had accepted that he sustained asbestos-related pulmonary disease as a result of his employment, and that he was entitled to medical care at the Office's expense for the effects of this condition. The Office requested that he submit evidence on the extent of his work-related disability due to this condition.

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[1] 33 ECAB 1453.

Appellant submitted an August 26, 1982 report from Dr. Zack stating:

> "To update you on Nino DiGrezio, I last saw him August 12th. He had an excellent response to Corticosteroids, suggesting an asthmatic component. He still has moderate obstructive abnormalities, however. His FEV-1 is 1.7 liters. While this is the best he has ever demonstrated, it still represents only 39% of his forced vital capacity. His diffusing capacity remains normal and his oxygenation remains normal. His chest x-ray continues to show a pleural reaction with calcification of the right base. He has evidence of asbestosis plus an apparently asthmatic bronchitic component. His degree of disability I would rate as mild. There has been no evidence of progression of disability. Nor has there been, however, improvement beyond the above level of dysfunction. It is entirely conceivable that the patient's earning capacity has been negatively impacted by this dysfunction."

In an October 7, 1982 report Dr. Zack stated:

> "I am unable to give a numerical percentage of how much disability relates to asbestosis. I would feel that, as I indicated in my previous letter, based on pulmonary function measurements, he is approximately 30% below what he should be and conceivably part of that 30% reduction represents asbestosis, however, a part could also be due to his smoking background. I feel that his optimal lung function level still represents enough dysfunction that there could be a negative impact on his earning ability."

On October 7, 1985 the Office referred appellant, the case record and a statement of accepted facts to Dr. David Kanarek, who is Board-certified in pulmonary diseases, for an evaluation of his condition. In an October 21, 1985 report Dr. Kanarek set forth appellant's work and medical histories, and described the findings on pulmonary function testing done on October 17, 1985 and on x-rays. Dr. Kanarek concluded:

> "Mr. DiGrezio had a clear exposure to asbestos when working at the Boston Naval Shipyard. It is my opinion that he developed pleural plaques and the diaphragmatic and parietal pleura calcification as a result of this exposure. In addition, although the latent period is quite long since his initial exposure

> it is likely that the pleural effusion represents a benign asbestos related pleural effusion. It should be noted that the pleural effusion cannot be held responsible for the calcification since the calcification was already present at the time the pleural effusion was diagnosed. His symptom of exertional dyspnea and his cough and general disability is related, however, to his obstructive lung disease which showed some reversibility on today's testing and is likely to be due to chronic asthma, particularly in view of the elevated single breath diffusing capacity. In addition he notes a response to Slophylline. It is unlikely that his cigarette smoking has been very important in the genesis of this problem although it is not possible to rule out chronic airway disease as a component. The pleural reactions to asbestos do not contribute to his symptomatology and his asbestos exposure has not resulted in any disability. At this stage he is not receiving intensive bronchodilator therapy and he had not received corticosteroid therapy according to him and it is not clear what maximum improvement can be expected from therapy of his obstructive airway disease. All therapeutic efforts would be directed toward relieving his obstructive airway disease. It is clear that his obstructive airway disease is severe and will lead to marked disability in the range of approximately 35% impairment."

By a decision dated November 13, 1985 the Office found that appellant sustained pulmonary injury consistent with exposure to asbestos in his employment, that there was no evidence of impairment or disability and therefore no basis for the payment of monetary benefits, and that periodic medical examinations were authorized at the Office's expense.

Appellant requested reconsideration, and submitted an April 7, 1986 report from Dr. Elliot L. Sagall, a Board-certified cardiologist. After setting forth appellant's work and medical history, and his symptoms and findings on physical examination, and reviewing the prior medical reports including those from Drs. Zack and Kanarek, Dr. Sagall concluded:

> "Based upon the history and symptomatology related by Mr. DiGrezio, the various medical data reviewed, and the findings of the present examination, as outlined above, it is my opinion that he is permanently disabled by reason of severe pulmonary impairment from performing the work of an electrician and from any other work activities except light, sedentary work of

> an inside nature in an environment free of potential pulmonary irritants.
>
> "It is my further opinion that Mr. DiGrezio's pulmonary impairment and resulting disability are due to the combined effects of underlying pulmonary emphysema with a bronchospastic component and pulmonary asbestosis and that, as such, his work disability is causally related to the heavy asbestos exposure during his employment as a helper electrician and electrician at the Boston Naval Shipyard."

Appellant also submitted an April 1, 1983 report from Dr. Bimal P. Jain, who is Board-certified in pulmonary disease, stating:

> "Mr. DiGrezio has a history of exposure to asbestos for eleven years in the naval shipyard. Also, he had been a heavy smoker smoking one pack of cigarettes daily for thirty years from age sixteen until 1967. I did full pulmonary function tests, a copy of which is attached with this letter. These tests show that he has very severe airways obstruction with severe diffusion defect. The diffusion defect could be secondary to emphysema or asbestosis, however, the increase in his oxygen after exercise tends to favor this being due to emphysema. His chest x-ray shows pleural calcification. Overall, my feeling is that most of Mr. DiGrezio's disability is from chronic bronchitis and emphysema. Although he has some involvement of his lungs especially the pleura by asbestosis, it is difficult to quantitate the degree of disability it is causing."

By a compensation order dated December 8, 1986 the Office found that the additional evidence was insufficient to warrant modification of its prior decision.

Appellant has the burden of establishing by the weight of probative, substantial evidence that his condition for which he claims compensation is causally related to his employment.[2] Where, as here, compensation for disability is claimed, appellant has the burden of proving that he is disabled for work as a result of an injury or condition causally related to his employment.[3] As part of his burden, appellant must furnish reasoned medical evidence, based on a proper factual and medical history. An award of compensation may not be made on the basis of surmise, conjecture, or speculation, or on an employee's unsupported belief of causal relation.[4]

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[2] *Walter J. Neuman*, 32 ECAB 69 (1980).

[3] *David H. Goss*, 32 ECAB 24 (1980).

The Board finds that appellant has not met his burden of proving that he has a disabling pulmonary condition causally related to his exposure to asbestos in his employment.

The medical evidence establishes that appellant has pleural effusion and calcification which are causally related to his exposure to asbestos in his employment, and the Office authorized periodic medical examinations at its expense. However, while Drs. Zack, Kanarek, and Jain, and an Office medical adviser all stated appellant has pleural effusion and calcification, none of these physicians stated that these pleural changes resulted in any lung dysfunction or disability. Dr. Kanarek stated "The pleural reactions to asbestos do not contribute to his symptomatology and his asbestos exposure has not resulted in any disability."

The medical evidence does not establish that appellant has any impairment of his lungs causing disability for work as a result of his exposure to asbestos. Dr. Zack, who is Board-certified in pulmonary diseases, diagnosed asbestosis, but did so on the basis of the pleural changes shown by x-rays. On the issue of whether appellant had any dysfunction of his lungs due to his exposure to asbestos, Dr. Zack offered only speculative opinions. In his March 3, 1978 report Dr. Zack stated that appellant's lung dysfunction was in part referrable to his history of smoking "but may well also represent occupational lung disease." In a June 22, 1978 report Dr. Zack diagnosed chronic obstructive pulmonary disease secondary to smoking and stated that "possibly" appellant's dyspnea was secondary to asbestos but that his smoking history could account for most of his symptoms and the abnormalities on his pulmonary function studies. In a November 6, 1980 report Dr. Zack stated that part of his decreased lung function "could also represent occupational lung disease as well" as being due to his smoking, and that the worsening of his expiratory flow rates "could represent either asbestos lung involvement or progression of obstructive lung disease." In an October 7, 1982 report Dr. Zack stated that "conceivably" part of his lung impairment shown by pulmonary function studies represented asbestosis. Dr. Zack's use of the terms "could be," "possibly," and "conceivably" in each of his statements on whether any of appellant's lung dysfunction is causally related to his exposure to asbestos renders these statements too speculative to meet appellant's burden of proof.[5] The April 1, 1983 report from

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[4] *Frances B. Evans*, 32 ECAB 60 (1980).

[5] *See Charles A. Massenzo*, 30 ECAB 844 (1979).

Dr. Jain is insufficient to meet appellant's burden of proof for the same reason, namely that Dr. Jain stated that appellant's severe diffusion defect on pulmonary function testing "could be" secondary to asbestosis. Dr. Jain added that other test results favored the view that the diffusion defect was due to emphysema.

The April 7, 1986 report from Dr. Sagall is not speculative, as the doctor stated that in his opinion appellant's "pulmonary impairment and resulting disability are due to the combined effects of underlying pulmonary emphysema with a bronchospastic component and pulmonary asbestosis and that, as such, his work disability is causally related to the heavy asbestos exposure during his employment." However, Dr. Sagall's report is insufficient to meet appellant's burden of proof for the reasons that it is not supported by rationale on causal relation,[6] and because Dr. Sagall did not point to any particular evidence to support his conclusion on causal relation.[7]

In an October 7, 1985 report Dr. Kanarek, who is Board-certified in pulmonary diseases and to whom the Office referred appellant for an evaluation, concluded that appellant was disabled by his severe obstructive airway disease but that this condition was related to his chronic asthma, and that his asbestos exposure had not resulted in any disability. Dr. Kanarek pointed to results of pulmonary function studies to support his conclusions.

As the medical evidence does not establish either that appellant's pleural effusion and calcification result in any disability or that he has an asbestos-related disabling lung condition, appellant is not entitled to compensation for disability. Appellant is also not entitled to a schedule award because the medical evidence does not establish a permanent lung impairment causally related to his exposure to asbestos in his employment, and for the additional reason that his last exposure to asbestos in his employment was before the effective date of the 1974 amendments to the Federal Employees' Compensation Act, which first provided for schedule awards for impairment of the lungs.[8]

The decision of the Office of Workers' Compensation Programs dated December 8, 1986 is affirmed.

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[6] *Ceferino L. Gonzales*, 32 ECAB 1591 (1981).

[7] *William J. Murray*, 35 ECAB 606 (1984).

[8] *Hiram L. Hendricks*, 33 ECAB 1487 (1982).

In the Matter of HENRY ROSS, JR. *and* DEPARTMENT OF THE AIR FORCE, KELLY AIR FORCE BASE, Tex.

Docket No. 87-1892; Submitted on the Record;
Issued January 26, 1988

Before GEORGE E. RIVERS, DAVID S. GERSON, MICHELE VON KELSCH

The issue is whether appellant has sustained an increase in hearing loss causally related to noise exposure in his federal employment.

On December 12, 1984, appellant, then a 61-year-old woodworker, filed a notice of occupational disease claiming partial binaural hearing loss caused by noise exposure in his federal employment. In a statement accompanying his claim, appellant alleged that in his job as a woodworker he was exposed to "excessive noise from industrial type cut off saws, ripsaws and nailing" and that he "worked in buildings where excessive noise occurred," identifying those buildings as "B 1566, KANNEX, B 3000, and KAFB," estimating his exposure at "an average of 2 to 4 hours per day, five days a week."

The employing establishment submitted to the Office of Workers' Compensation Programs a statement dated January 28, 1985, which stated in relevant part as follows:

> "[Appellant] has previously received a schedule award from . . . the Office of Workers' Compensation Programs for hearing loss due to exposure to hazardous noise. He received $25,590 which was paid to him between 3 Sep 1983 and 17 Sep 1984. Upon expiration of said award, he returned to the compensation office [of the employing establishment] to file a new claim for additional loss of hearing that he alleges is due to continued exposure to hazardous noise." [1]

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[1] The record does not contain a copy of the schedule award granted to appellant or indicate the percentage of hearing loss sustained by appellant for which he received a schedule award. The record does contain a copy of a December 16, 1982 letter to appellant from the Office advising him that the medical evidence of record has established that he sustained an employment-related noise-induced hearing loss and that he should submit a Form CA-4 so that the Office may process his schedule award. The record also contains a copy of appellant's Form CA-4 dated February 3, 1981. Additionally, while the record contains audiograms performed on appellant periodically during the period February 1981 to September 1985, it does not indicate which audiogram, if included in the record, was the basis of appellant's schedule award.

In this statement, the employing establishment clarified that appellant was alleging exposure to hazardous noise during the period October 19, 1982 through December 3, 1984.[2]

In addition to the foregoing statement, the employing establishment submitted certain miscellaneous personnel information on appellant, a list of appellant's duties and responsibilities as prepared by his supervisor which list included operating a power band saw, a power ripsaw and a power cut-off saw and the job description of a woodworker which also listed as part of the duties of this position "use of power saws and [operation of] drills and other power equipment as required." The job description also noted that a woodworker is exposed to, *inter alia*, "excessive noise, intermittent" and "constant noise."

The employing establishment also submitted a form occupational noise exposure summary which indicated that during the period October 19, 1982 to December 3, 1984, appellant worked in the locations designated as KANNEX, B 3000, B 4194 and KAFB and was exposed to industrial type cut-off saws, ripsaws and nailing but that these locations were not considered noise hazardous areas. The employing establishment did not provide on this form the hours of noise distribution during the workday as called for by the form. With respect to buildings B 3000 and B 4194, a report dated September 10, 1985, submitted to the Office by the employing establishment, indicated that the maintenance operation in building B 3000 was closed in 1974 and moved to building 360 and that the only noise levels recorded in the files for building B 3000 were from a balancing machine known as a magnetic clam shell and that sound levels at the operators' position equaled a 99 decibel average. The report stated that at building B 4194, the last sound level readings were recorded in May 1974 and yielded the following information: "table saw at operators' position equaled a 100 decibel average;" circular saw at operators' position equaled a 105 decibel average; both saws in operation within an eighty foot radius equaled an 84 decibel average;" and any decibel average readings of 85 or greater required the wearing of hearing protection. The employing establishment also submitted a May 22, 1985 noise exposure report on building B 1566 which report stated that the building had been "designated as a hazardous noise area."

The employing establishment also submitted statements from three of appellant's supervisors. One supervisor, in his statement dated March 13, 1985, stated that although appellant was assigned to building B 1566, he actually worked in KANNEX and buildings B 3000 and B 4194 and that these areas were not considered noise hazardous and the wearing of ear protectors in these locations was not mandatory. The supervisor further stated that appellant had worked in these nonhazardous noise areas since June 1976. Another supervisor in his statements dated October 31, 1984 and February 5, 1985 claimed, in his October 31, 1984 statement, that appellant was not exposed to hazardous noise in his current position and, accordingly, was not required to wear hearing protectors. He further stated that appellant had been removed from hazardous noise working areas in January 1975. In his statement dated February 5, 1985, the supervisor stated that appellant had not been exposed to noise such as cutting with ripsaws, band saws and radial arm saws since June 17, 1984, the date he became appellant's supervisor. The third supervisor, in his statement, also dated February 5, 1985, stated that appellant had not been exposed to noise area such as cutting with ripsaws, band saws and radial arm saws since January 1975.

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[2] The record indicates that appellant retired shortly prior to, or after the filing of his December 13, 1984 claim.

By letters dated January 22, 1987, the Office requested additional factual and medical information from both the employing establishment and appellant regarding appellant's hearing loss claim.

In response to this request, the employing establishment submitted additional copies of factual information it had previously submitted. In addition to this information, appellant submitted copies of his February 3, 1981 hearing loss claim which included a February 3, 1981 report of appellant's then supervisor who stated that appellant was exposed to noise for three hours per day five days a week. The employing establishment also submitted an occupational noise exposure summary covering the period December 16, 1945 to December 3, 1984 which indicated that during the period October 19, 1982 to December 3, 1984, appellant was exposed to industrial type cut-off saws, ripsaws and nailing for two hours a day.

In response to the Office's request for additional information, appellant submitted his job description, his personnel information and noise exposure data, all of which had been previously submitted by the employing establishment.

By letter dated March 3, 1987, the Office requested that the employing establishment submit copies of all audiograms on file for appellant. The employing establishment submitted audiograms dated February 10, 1981 and March 23, 1981, each of which were labeled "void" and were noted on the "chronological record of appellant's medical care" as being "invalid." The employing establishment submitted audiograms dated May 5, 1981 and December 1, 1982, each of which were noted on the chronological record as reporting a "nonorganic hearing loss." The employing establishment also submitted audiograms dated June 4, 1985 and September 11, 1985 and the report of an Office medical adviser dated September 25, 1985. The September 25, 1985 report indicates that the Office medical adviser reviewed the results of the September 11, 1985 audiogram and, after applying the Office's then standards[3] for evaluating hearing loss to these results, calculated a 45 percent monaural loss of hearing in appellant's right ear and a 42 percent monaural loss of hearing in appellant's left ear for a total 43 percent binaural loss of hearing.

By letter dated May 3, 1987, the Office requested that appellant submit a detailed history of each building he had worked in from 1982 to the date he retired and a detailed list of each piece of equipment that he used, or was exposed to, and which he believed contributed to his additional hearing loss. In this letter, the Office also requested that appellant advise of the date that he last used various power saws, noting that it had received conflicting reports on this issue. The Office stated that one report indicated that appellant did not use power saws after January 1975 and another report indicated that he did not use them after June 17, 1984.

By letter dated May 12, 1987, the Office again asked appellant to respond to the questions listed in its letter of March 3, 1987, advised appellant that he has the burden to establish that he was exposed to hazardous noise between 1982 and the date he retired and that the employing establishment maintained that he had not been exposed to hazardous noise during that period.

By compensation order dated July 29, 1987, which incorporated a memorandum summarizing the evidence, the Office denied appellant's claim on the basis that he failed to meet his burden of proof in establishing that he sustained an increase in hearing loss due to exposure to hazardous noise in his employment. In the memorandum, the Office stated that "there is no evidence in the file showing that [appellant] was exposed to hazardous noise." The Office further stated that appellant's audiograms "do not establish that he was exposed to hazardous noise since October 1982."

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[3] Subsequent to February 28, 1973 but prior to February 24, 1986, the Office evaluated hearing loss claims in accordance with the standards of the National Institute for Occupational Safety and Health (NIOSH) as set forth in Chapter 6 of its publication, *Occupational Exposure to Noise* (published in 1972 by the U.S. Department of Health, Education and Welfare, Health Services and Mental Health Administration, NIOSH) which measured the percentage loss of hearing at 1,000, 2,000 and 3,000 cycles per second and deducted a 25 decibel fence after the decibel loss scores were averaged. On February 24, 1986, the Office adopted a new standard for determining the extent of permanent impairment in hearing loss which is based on the formula contained in the second edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (2nd ed. 1984).

The Board finds that the case is not in posture for decision.

The Office correctly pointed out to appellant that he has the burden of establishing by the weight of reliable, probative and substantial evidence that his condition was caused or adversely affected by his employment.[4] However, it is well-established that proceedings under the Federal Employees' Compensation Act [5] are not adversary in nature nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.[6]

In hearing loss claims, noise exposure data on the claimant's working environment are generally furnished by the employing establishment.[7] In the present case, the employing establishment submitted such data together with a description of appellant's duties and responsibilities but the information submitted contained inconsistent statements as to when appellant's exposure to hazardous noise ceased. Since the employing establishment provided inconsistent information, the Office should have requested clarification of these inconsistencies from the employing establishment.[8]

The position description of a woodworker and the list of appellant's duties and responsibilities submitted by the employing establishment, each included, as part of appellant's duties, use and operation of a power band saw, a power ripsaw and a power cut-off saw indicating that appellant used and was exposed to noise from this equipment during the period he is claiming additional hearing loss. However, one of appellant's supervisors, in his February 5, 1985 statement, claimed that appellant had not been exposed to noise from these saws since January 1975. Another supervisor, in his statement also dated February 5, 1985, claimed that appellant had not been exposed to noise from the various power saws since June 17, 1984, the date this individual became appellant's supervisor, implying, however, that appellant may have been exposed to noise from this equipment prior to June 17, 1984. This is the same super-

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[4] *Birger Areskog*, 30 ECAB 567 (1979).

[5] 5 U.S.C. section 8101 *et seq.*

[6] *See Russell Martin Dawson*, 32 ECAB 1998 (1981) and *Robert M. Brown*, 30 ECAB 175 (1978).

[7] *See* Federal (FECA) Procedure Manual, Chapter 2-806, paragraph 16b(2).

[8] *See Charles E. Meinsler*, 18 ECAB 500 (1967).

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visor who prepared the list of appellant's duties and responsibilities which included use and operation of various power saws.

The position description of a woodworker submitted by the employing establishment stated that a woodworker is exposed to "excessive noise, intermittent" and "constant noise." Two of the occupational noise summaries submitted by the employing establishment stated that during the period October 19, 1982 to December 3, 1984, appellant was exposed to noise from industrial type cut off saws and ripsaws and nailing for two hours a day. This information contradicts the statements of the two supervisors heretofore discussed.

Additionally, although the employing establishment classified appellant's working locations as nonhazardous noise areas and as not requiring the wearing of ear protectors, the sound level surveys, submitted by the employing establishment, on several of appellant's working locations, while not current, indicated exposure to hazardous noise in excess of 85 decibels. This is the level established by the Office as a guideline for determining noise exposure potentially dangerous to hearing[9] and, accordingly, the Office should have made further inquiries as to the current levels of sound in appellant's working locations.

With respect to the medical evidence, the Office received audiometric data pertaining to appellant's hearing loss from the employing establishment where, the record indicates, all his audiograms were performed. Appellant's September 11, 1985 audiogram, which was part of the audiometric data furnished by the employing establishment, was evaluated on September 25, 1985 by an Office medical adviser who, using the Office's then current standards for evaluating hearing loss,[10] determined that appellant had a 43 percent binaural hearing loss. In the memorandum of the Office incorporated in its decision of July 29, 1987 the Office found that appellant's audiograms, which included the September 11, 1985 audiogram, did not establish that he was exposed to hazardous noise since October 1982. However, the Office medical adviser did not provide any opinion as to whether appellant was exposed to hazardous noise since October 1982. The Office medical adviser also did not indicate in his report whether appellant had sustained an increase in hearing loss from the date of the audiogram which served as the basis of appellant's schedule award or why he chose to review the September 11, 1985 audiogram.[11]

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[9] *See* FECA Program Memorandum No. 253 (issued April 16, 1979).

[10] *See* note 3 *supra*.

[11] When there are several audiograms, the Office must give a rationalized explanation for selecting one audiogram over the other. *See Harry Frank*, 33 ECAB 261 (1981).

In view of the foregoing, the Board finds that the Office must further develop the case record.[12]

On remand, the Office should combine appellant's case file pertaining to his December 12, 1984 claim with his file pertaining to his schedule award [13] in order to determine whether appellant has sustained an increase in hearing loss subsequent to the date his schedule award commenced.[14]

The Office should request additional information from appellant and the employing establishment regarding: (1) whether appellant's duties as a woodworker were consistent or changed any during the period October 19, 1982 to December 3, 1984; (2) what buildings or locations appellant worked in during this period and clarify any discrepancies in responses; (3) what noise appellant was exposed to during this period including the source of the noise, and the frequency and duration of exposure; and (4) when appellant's exposure to hazardous noise ceased. The Office should investigate whether more current sound level surveys are available for the locations where appellant worked.

The Office should request that an Office medical adviser review appellant's September 11, 1985 audiogram, or such other audiogram which he believes appropriate and submit a report explaining his choice of audiogram, discussing the results and reliability of audiometric testing, stating whether the testing shows an increase in hearing loss and, if so, providing a medical opinion on whether there is a causal relationship between appellant's increased hearing loss and employment-related noise exposure. In the event the Office medical adviser determines that none of the audiograms on record are reliable, the Office should request that appellant submit medical evidence which meets the Office's requirements for medical evidence required in hearing loss cases [15] and advise appellant as to what those requirements are.

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[12] *Charles E. Meinsler*, note 8, *supra*.

[13] The Office was correct, however, in treating appellant's December 13, 1984 claim as a new claim and opening a new file. The Board has previously held that where exposure to noise at work causes an adverse effect on an employee's hearing, every such exposure constitutes a new injury. (*See Robert Goodloe*, 10 ECAB 164 (1958)). If an employee continues to be exposed to noise at work subsequent to the filing of a hearing loss claim and he believes the additional exposure has caused an increase in his loss of hearing, he must file another claim for the additional injury in order to secure benefits for the increased loss. (*See Charles E. Moore*, 35 ECAB 876 (1984)). In the present case, since appellant was previously determined to have an employment-related loss of hearing, the prior claim and supporting evidence is relevant in determining whether appellant has sustained additional hearing loss.

[14] It is a well-established principle that the period covered by a schedule award commences on the date the employee reaches maximum improvement from the residuals of the employment injury. *See Marie J. Born*, 27 ECAB 623 (1976) and the citations set forth in fns. 5 and 6.

[15] *See* Federal (FECA) Procedure Manual, *Occupational Illness*, Part 2—Claims, Chapter 2-806, FECA Tr. No. 82-15 (issued May 1982).

The Office should further develop the record as it deems necessary and should issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated July 29, 1987 is set aside and the case remanded for further proceedings in accordance with this decision.

In the Matter of RUSSELL D. KNOWLES *and* U.S. DEPARTMENT OF THE ARMY, CIVILIAN PERSONNEL OFFICE, FORT LEONARD WOOD, MO.

Docket No. 87-1241; Submitted on the Record;
Issued January 27, 1988

Before DAVID S. GERSON, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether appellant has established entitlement to any benefits under the Federal Employees' Compensation Act on or after June 8, 1986, the date the Office of Workers' Compensation Programs terminated compensation benefits.

On April 14, 1983 appellant, then a 31-year-old speech pathologist, filed a claim for compensation alleging that he injured his back on November 12, 1982 when a child jumped into his arms causing a back strain. Appellant stopped work on December 7, 1982 and returned to work on April 12, 1983 performing light duty. Appellant stopped work again on May 9, 1983 and returned to light duty on September 12, 1983.

In a report dated June 17, 1983 Dr. William G. Quinn, a Board-certified orthopedic surgeon, diagnosed appellant's condition as herniated disc, L4, L5.

The Office of Workers' Compensation Programs accepted appellant's claim for a low back strain and herniated nucleus pulposus at L4-5. L5-S1 and appellant received temporary total disability compensation benefits for the intermittent periods of disability between January 18 to September 12, 1983. The Office determined, however, that appellant was not entitled to continuation of pay because he did not provide written notice of injury within thirty days of the injury, as required by the Federal Employees' Compensation Act.

On February 24, 1984 appellant filed a claim for recurrence of disability causally related to the November 12, 1982 employment injury commencing December 13, 1983. Appellant stopped work on December 13, 1983 and returned to work on a part time basis on February 21, 1984.

In a report dated February 16, 1984 Dr. Quinn diagnosed appellant's condition as herniated lumbar disc L4–5, L5–S1. In a report dated July 12, 1984 Dr. Quinn stated that appellant was totally disabled and unable to work during the period December 13, 1983 through February 20, 1984.

The Office accepted appellant's claim for recurrence of disability and he received temporary total disability compensation benefits for the period December 14, 1983 to February 20, 1984 and partial disability compensation for the period February 21, 1984 to March 6, 1987.

On November 14, 1984 appellant filed another claim for recurrence of disability causally related to the November 12, 1982 employment injury commencing October 9, 1984. Appellant stopped work on October 10, 1984 and returned to work on October 15, 1984. Appellant stopped work again on October 29, 1984 and has not returned.

In a report dated November 6, 1984 Dr. Garth S. Russell, a Board-certified orthopedic surgeon, stated as follows:

> "[Appellant's] history extends back to November 12, 1982. While employed as a speech pathologist at the Fort Leonard Wood Army Community Hospital, the patient states that a preschool girl, weighing approximately 50 to 55 pounds, jumped into the patient's arms and as he caught her he had acute pain in the low back region. . . .
>
> "Lumbar spine and thoracic spine x-rays were obtained on [appellant] on October 29, 1984 which revealed persistent narrowing of the L5–S1 intervertebral disc space; otherwise unremarkable.
>
> "A [computerized axial tomography] CAT scan of the lumbar spine region, L3 to S1, was obtained on [appellant] on October 31, 1984 which revealed a significant central bulging intervertebral disc at the L4–L5 level in addition to neural foraminal stenosis at the L5–S1 level bilaterally."

Dr. Russell diagnosed appellant's condition as L5 nerve root pressure secondary to large central bulging intervertebral disc, level L4–L5; and S1 nerve root pressure secondary to neural foraminal stenosis, level L5–S1 bilaterally.

In a report dated November 27, 1984 Dr. Russell further noted:

> "On 11-7-84, [appellant] was taken to the operating room and underwent a total decompression laminectomy of L5 with partial decompression laminectomy of L4, foraminotomies of L5 and S1 nerve roots bilaterally, and a posterior intertransverse fusion from L4 to the sacrum. [Appellant] tolerated the procedure and is progressing satisfactorily. He has a return appointment on December 18, at which time a more definite prognosis can be determined.
>
> "It is my medical opinion that [appellant] has been totally disabled from his occupation since October 27, 1984, and it is estimated that he will continue to be disabled approximately four months from the date of surgery, depending upon his postoperative course."

By letter compensation order dated December 13, 1984 the Office accepted appellant's claim for recurrence of disability. Appellant received temporary total disability compensation benefits for the period October 29, 1984 to November 24, 1984 and was placed on the periodic compensation rolls.

In a report dated February 26, 1985 Dr. Russell stated as follows:

> "Postoperatively, [appellant] is doing very well. . . . I believe that he will continue to improve, and I estimate that his return to work will be on or about May 2, 1985. . . . It is my medical opinion that [appellant's] injury while catching the child, occurring as noted in the history, was the cause of his difficulty."

In a report dated May 30, 1985 Dr. Russell noted that appellant's position at his employing establishment had been terminated and that he was extremely frustrated, hostile and depressed. He recommended that appellant seek psychiatric rehabilitation.

In a report dated October 28, 1985 Katherine Branson, a counselor, stated that when appellant began counselling on July 8, 1985, he had a great deal of anger with respect to his disability, but that he was discharged from counselling because he had learned to control his feelings.

In a Work Restriction Evaluation Form dated January 31, 1986, and based upon a December 1985 examination, Dr. Russell noted that appellant was able to perform light duty for 8 hours a day. He limited appellant's activities as follows: a 50 pound lifting restriction; one or two hours of bending or twisting; three hours a day of squatting or climbing; four hours a day of kneeling; and six hours a day of standing. Dr. Russell also indicated that appellant had not yet reached maximum improvement.

By letter dated March 6, 1986 the Office asked Dr. Russell whether appellant was capable of returning to his previous job as a speech pathologist.

In a letter dated March 20, 1986 Dr. Russell stated as follows:

> "I have reviewed the position of speech pathologist, in which the supervisory controls and major duties were noted. It is my medical opinion, based upon reasonable medical certainty, that [appellant] should be able to return to this activity level on or about May 1, 1986."

On April 28, 1986 appellant began working as a speech pathologist at a large hospital in the state of Missouri.

By compensation order dated April 30, 1986 the Office rejected appellant's claim for continued compensation as the medical evidence failed to support disability beyond May 1, 1986. Appellant's compensation benefits were terminated effective June 8, 1986.

On June 3, 1986 the Office received appellant's request for a hearing before an Office hearing representative. A hearing was set for November 3, 1986.

At the hearing appellant explained that his present job as a speech pathologist was similar to his previous job at his employing establishment. He stated that he was having difficulties at his present job because his employers "were concerned about my physical condition and ability to perform as a speech pathologist, and therefore they were considering firing me." Appellant stated that the physical requirement of the job had resulted in him continuously reinjuring his back. He stated that he was unable to physically manipulate the children or sit for prolonged periods of time and work with adult patients. He noted that his most recent reinjury occurred on July 22, 1986 and that he was absent from work for two and a half weeks as a result.

After the hearing appellant submitted additional medical evidence. In a report dated December 8, 1986, Dr. Russell stated as follows:

> "Following the previous reports, [appellant] was last seen on April 28, 1986. A permanent, partial impairment rating of 60 percent was given. [Appellant] was able to return to gainful employment as a speech therapist, but states that he is unable to continue in that employment. The job description for this oc-

> cupation required lifting children weighing up to 100 pounds and dealing with hyperactive, emotionally disturbed children. In addition, there is an extensive amount of walking, involving the climbing of stairs.
>
> "As documented in the previous reports, there is no question that [appellant] would have much difficulty in returning to those job requirements. He will be unable to do any lifting above 30–40 pounds consistently. He will be unable to sit for periods longer than two hours, or to stand for longer than two hours at any one time.
>
> "[Appellant] is able to carry on some of the functions of a speech therapist, such as evaluating and working with children, as long as he did not have to submit to the above activities. In evaluating the job descriptions of a speech pathologist, it is my medical opinion that he would now be able to carry on approximately 40 percent of the duties as per the job description."

In a report dated December 9, 1986 Dr. William F. Blank, Board-certified in pathology, gave his findings upon physical examination and concluded:

> "It is my opinion that [appellant] has the pain he complains of and that it is due to the injury he sustained to his back in November 1982 and to unsuccessful surgical repair of this injury.
>
> "Under these conditions I feel it would be very difficult, if not impossible for him to work, at this time, in any capacity that required him to lift over 10 to 20 pounds, bend forward more than 20 degrees or to walk or sit for long periods of time. The pain that these activities would cause him, would make it very difficult to satisfactorily perform any job that had these requirements. It is difficult to say if his condition is permanent or temporary. With continued physical therapy and appropriate psychological support, it is possible that his pain will remit to a point where he could tolerate these activities."

In a report dated January 6, 1986 Dr. Linnetle J. Sells, an osteopath, stated as follows:

> "I have known [appellant] for several years. Since his injury at Fort Leonard Wood he has had chronic pain. His condition appears to be deteriorating due to his full-time work as a speech therapist. His job requires bending, lifting of children, sitting

> for long periods and pushing wheel chairs. Because of these requirements he constantly re-injures his back.
>
> "It is my opinion that [appellant] has a chronic pain condition secondary to his back injury and surgical repair. I feel he is unfit for full-time employment as a speech therapist. I feel this condition is permanent and he should be given disability compensation."

By decision dated February 3, 1987, the Office hearing representative concluded that the weight of medical evidence rested with Dr. Russell's reports dated January 31, 1986 and March 20, 1986 and that the Office met its burden of proof in establishing that appellant had no disability after June 8, 1986 causally related to the November 17, 1982 employment injury.

The Board finds that appellant has not presented a claim for compensation due to a disability, wage loss or other benefits available under the Federal Employees' Compensation Act on or after June 8, 1986, the date the Office of Workers' Compensation Programs terminated compensation benefits.

To have a compensable claim under the Federal Employees' Compensation Act, a claimant must have sustained disability, a loss of wage-earning capacity or a permanent impairment due to an employment injury, have been denied benefits available under the Act such as medical benefits, vocational rehabilitation or continuation of pay, have had compensation terminated or suspended, or had an overpayment of compensation declared for which recovery is sought. Neither the Board nor the Office should consider a hypothetical or abstract claim for disability, wage loss or other benefits available under the Act.[1]

In the present case appellant began work as a speech pathologist at a large hospital in the state of Missouri on April 28, 1986. His compensation benefits were properly terminated effective June 8, 1986. Appellant alleges that he is having difficulty at his present job, and that the physical requirements of the job have resulted in him continuously reinjuring his back. Appellant, however, continues to work at the position of speech pathologist. He therefore has not established entitlement to any disability, wage loss or other benefits provided by the Act. While he has submitted reports by Drs. Russell, Blank and Sells stating that he is unable to perform the duties of speech pathologist, these reports are entitled to little probative value. None of the doctors have adequately explained why they believe appellant is disabled, considering the fact that he has been able to work as a speech pathologist since April 28, 1986. The doctors appear to be concerned that appellant will reinjure his back, or that his job will cause him constant pain. This Board, however, has previously stated that compensation cannot be awarded for prospective disability.[2] Appellant therefore has not shown that he has sustained any disability, lost wages or has been denied any benefits for which he could submit a claim under the Act on or after June 8, 1986, the date the Office of Workers' Compensation Programs terminated compensation benefits.

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[1] *Frances Fowler*, 39 ECAB 890 (1987).

The decision of the Office of Workers' Compensation Programs dated February 3, 1987 is hereby affirmed.

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[2] *Herbert F. Straerkel*, 31 ECAB 1177 (1980).

In the Matter of CAROLYN A. CAMPEAU *and* VETERANS ADMINISTRATION, VETERANS ADMINISTRATION MEDICAL CENTER, St. Louis, Mo.

Docket No. 87-1737; Submitted on the Record;
Issued January 29, 1988

Before DAVID S. GERSON, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether appellant's injury sustained while bowling constitutes an injury in the performance of duty.

On November 12, 1986 at 6:45 p.m. appellant, then a 39-year-old secretary, sustained a low back strain while bowling at the bowling lanes on the employing establishment premises. She stopped working on November 13, 1986 and returned to work on December 8, 1986.

The employing establishment stated in a November 19, 1986 letter that appellant was "a member of the VA Bowling League which is an informal recreational activity recognized by our Medical Center Director." The employing establishment submitted a copy of a weekly publication entitled VA *Announcements* for the period August 18 to 22, 1986 which stated *inter alia* that "JB [Jefferson Barracks]/JC [John Cochran duty station] Mixed Bowling League to Begin in September," and that the "League would like to invite *all* VA employees to come and join the League on September 3, 1986, at 5:00 p.m. in the VA Bowling Alley at JB."[1]

The case record establishes that appellant's regular work day is from 7:45 a.m. to 4:15 p.m. and that the injury while bowling occurred on the employing establishment premises after appellant's regular working hours. In response to questions posed by the Office of Workers' Compensation Programs appellant stated in replies received December 11, 1986 that the VA Bowling League bowled on Wednesday evenings beginning at 5:00 p.m., after regular working hours, in order to allow employees from the John Cochran duty station ample time to arrive and bowl at the employing establishment lanes. Appellant answered "no" in response to questions whether her employer had required or persuaded her or other employees to participate in the bowling activity.

By letter dated January 13, 1987 the Office requested the employing establishment to state whether appellant and other employees had been required or persuaded to participate in the bowling activity, what specific benefit the agency derived from appellant's participation in the activity, whether such participation violated any agency rules or regulations, and what leadership, equipment or facilities the employer provided for the activity.

The employing establishment replied as follows in a January 26, 1986 letter:

> "1. The VA bowling league is an informal recreational activity recognized by management. Employee participation to join the league was optional. The invitation to join the league was included in our *ANNOUNCEMENTS*, a weekly Medical Center publication approved by our Director, the head of this medical center.
>
> "2. Benefits the agency derives from employee participation are:
>
> > A. Maintenance or improvement in employee physical fitness.
> >
> > B. Reduction of employee stress.
> >
> > C. Employee comradeship and socialization.
>
> "3. The weekly *ANNOUNCEMENTS* is disseminated to all VA employees at this Medical Center; therefore, the invitation to join the bowling league was extended to *ALL* VA Medical Center employees.

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[1] Appellant was an employee of the Jefferson Barracks Division of the employing establishment.

> "4. Mrs. Campeau's participation in the activity did not violate any agency rules nor regulations.
>
> "5. The VA provided a fully equipped six lane Bowling Alley which is located in Building 61 on the medical center's premises."

By letter dated April 11, 1987 the Office requested the employing establishment to state how much control the agency has over the bowling league, who organized the league, maintains the bowling alleys, finances the bowling activity and makes the rules and schedules for the league and whether the agency in any way persuaded appellant to participate in the league.

The employing establishment responded as follows on April 28, 1987:

> "1. The league was organized in 1968 by a group of VA employees. The agency's involvement includes the following:
>
> > —Authorization to use the Bowling Lanes (See enclosed letter of request dated 8/25/86 and last year's request dated 8/16/85).
> >
> > —League rules set by the medical center's Chief of Recreation Service.
> >
> > —Recreation Service contracts out the maintenance required for the lanes.
>
> "2. Minor Operating maintenance is performed by VA bowling league members who have been trained by employees from our Engineering Service. All minor maintenance activities are reported to Chief, Recreation Service. Major operating maintenance is handled by our Recreation Service personnel which has a maintenance contract with Building Maintenance Incorporated of St. Louis, Missouri.
>
> "3. The rules and schedules are made by members of the bowling league. (See enclosed JB Mixed Bowling League Rules). Note: This medical center is a consolidated center consisting of two duty stations located 18 miles apart. The bowling lanes are located on the Jefferson Barracks (J.B.) grounds; however, membership is open to John Cochran (J.C.) employees. Thus the abbreviation for JB & JC. The Chief of Recreation Service also sets rules for the bowling league (enclosed).
>
> "4. Bowling activity is financed solely by bowling league members.

> "5. Employee participation is voluntary based on the invitation to join the bowling league which is published in the VA *Announcements,* a weekly Medical Center publication approved by our Director."

The employing establishment submitted a list of ten rules for the JB Mixed League set by its Chief of Recreation Service. These included requirements that League participants have their own bowling shoes and ball, that the area be left clean after bowling, that no children, visitors or patients would be allowed in the bowling area while the league was there, that the bowling alleys would be open to employees only from 4:30 to 8:00 p.m., that doors must be locked at all times, that the employing establishment "will not be responsible for lost articles, clothing, or injuries," that only official league members could bowl on the lanes and that a request for approval of the use of the bowling lanes must be submitted annually to the Chief of Recreation Services before the first night of bowling.

The employing establishment also submitted a list of 23 rules for the JB Mixed Bowling League made by league members and copies of the August 25, 1986 and August 16, 1985 letters from league officers to the VA Medical Center Director requesting the use of the bowling lanes on Wednesday nights during designated hours. The league rules state *inter alia* that each member shall pay a $2.00 season initiation fee and regular dues of $2.00 each bowling week.

In reply to an Office request to clarify some responses, the Acting Chief of Recreation Services stated on May 18, 1987 that the VA Medical Center has bowling alleys for the use of its patients, that the Chief of Recreational Services sets guidelines for the use of the facility and does not set the actual rules of the league, and that requiring the league to request authorization annually to use the bowling alleys "is a formality just in case the VAMC has a change in the time they need the bowling alley."

On May 19, 1987 the Office inquired whether the employing establishment actually provided a "fully equipped" six lane bowling alley as previously stated since other evidence indicated the employees had to provide their own bowling ball and shoes. The employing establishment replied that it provided only the lanes and that the league members provided the necessary equipment according to the rules. It further stated that the Chief of Recreation Services is the supervisor of patient activities and "[t]here is nothing in his position description about employees."

By compensation order dated May 20, 1987 the Office rejected the claim on the ground that "[f]actual evidence does not establish that injury occurred in the performance of duty."

The Board finds that appellant's injury sustained while bowling does not constitute an injury in the performance of duty.

The general criteria for performance of duty as it relates to recreational and social activities is set forth in *Larson* as follows:

> "Recreational or social activities are within the course of employment when (1) They occur on the premises during a lunch or recreation period as a regular incident of the employment; or (2) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or (3) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life." [2]

Larson specifically addresses the issue of athletic teams, stating that the pertinent performance of duty test involves the following criteria:

> "[O]n or off the premises and in or out of working hours; varying shades of employer initiative; differences in amount of employer contribution of money or equipment; differing quantities and types of employer benefit." [3]

Larson states that the outcome of such recreation cases turns on the "different 'mix' in the fact situation."

In *Lester W. Dustin,*[4] the Board found that the claimant who sustained a back injury in a softball game on government property after working hours was within the performance of duty when he was injured. The Board found that the employing establishment exercised such control over the Civilian Welfare Fund, which administered the softball program in all aspects, that the employing establishment was regarded as controlling the recreational activity in which the claimant was injured.

In *Stephen H. Greenleigh,*[5] the Board also found that an injury to an employee while playing softball was found to have occurred in the performance of duty. The Board noted that the softball game was played shortly after working hours on the employment premises on a field maintained by the Government and pointed out the following additional relevant factors:

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[2] Larson, *Workmen's Compensation Law,* section 22.00.

[3] Larson, section 22.24.

[4] 33 ECAB 571 (1982).

[5] 23 ECAB 53 (1971).

> "The evidence shows that the employer recognized and encouraged the association [of employees who sponsored the softball league], made substantial contributions to it both directly and indirectly, and exercised a certain amount of control over its activities. The evidence establishes further that a primary purpose of appellant [a lawyer] in participating in the softball program was to increase his rapport with officials of the employing establishment for whom he handled legal problems and that his participation was in accord with the policy of his office of encouraging its attorney's to develop close, cordial relationships with the officials of the agency with whom they dealt in their work. * * *"[6]

The facts of the instant case are readily distinguishable from those of the *Dustin* and *Greenleigh* cases. With the exception of the fact that the bowling activity occurred on the premises of the employing establishment, there was no showing of a substantial connection with the employment. Appellant's employer did not persuade, require or sponsor participation by appellant in the bowling league, and derived no substantial direct benefit from the bowling activities other than the maintenance or improvement in employee physical fitness, comradeship and socialization, and the reduction of employment stress, which constitute only the intangible value of improvement in employee health and morale common to all kinds of recreational and social life. The fact that the bowling activity occurred on the employing establishment premises is not sufficient, in and of itself, to bring the activity within the performance of duty.[7] Here the evidence establishes that the employees voluntarily and not the employing establishment formed the bowling league, that the league and not the employing establishment invited employees to join the league, that financial support for the bowling league was not provided by the employing establishment, but solely by league members, that league members provided minor operating maintenance, that while the bowling alleys, primarily for the use of patients, were opened to the bowling league one night a week after regular working hours upon the annual request by the league, the league members provided the necessary bowling equipment. The evidence further establishes that the league made its rules and regulations, and that the rules made by the Chief of Recreational Services, the supervisor of patient activities, constituted only guidelines for the use of the facility by the league and not operating rules of the league itself. The printing of league news in the VA *Announcements* is a minimal connection with the employment.[8] Similarly, the fact that major operating maintenance of the bowling alleys was handled by the employing establishment is not sufficient to bring appellant's injury within the performance of duty in light of the fact that the bowling alleys were provided primarily for patients of the employing establishment and that the league members provided their own minor operating maintenance.

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[6] 23 ECAB 53, 59 (1971).

[7] *Kermit T. Bryant*, 30 ECAB 893 (1979), *Donald C. Huebler*, 28 ECAB 17 (1976).

Considering the "mix" of facts in this case, the Board concludes that appellant's injury was not sustained in the performance of duty.

The decision of Office of Workers' Compensation Programs dated May 20, 1987 is hereby affirmed.[9]

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[8] *See Donald C. Huebler, supra.*

[9] On appeal appellant asserts she was "not given a choice of physicians." Since the Office rejected the claim on the ground that appellant's injury was not sustained in the performance of duty appellant's assertions concerning choice of physicians are not relevant to the issue on appeal.

In the Matter of Eugene F. Carbonneau *and* Department of the Army, Office of the Deputy Chief of Staff for Research, Development and Acquisition, Washington, D.C.

Docket No. 86-1925; Submitted on the Record;
Issued January 29, 1988

Re: Attorney's Fee

Before Michael J. Walsh, David S. Gerson, Michele von Kelsch

The issue is whether the Office of Workers' Compensation Programs abused its discretion in approving an attorney's fee of $10,522.50.

Sheldon A. Cohen, Esquire, Arlington, Virginia, the employee's representative before the Office, requested approval of a fee in the sum of ten thousand nine hundred seventy-two dollars and fifty cents ($10,972.50) for 146.3 hours of work performed before the Office from May 8, 1980 through January 8, 1985 in this case.

By letter dated January 29, 1985 the employee objected to the requested fee stating that the requested fee was excessive. He stated that he believed a fee of $2,500.00 to be reasonable and appropriate.

In response to the Office's request for his comments, the attorney stated in a May 3, 1985 letter that he agreed to waive his fee for the time spent on January 3, 4, 7, and 8, 1985 totalling 4.1 hours in preparation of the petition for attorney fees.

By compensation order dated August 20, 1985 the Office approved an attorney's fee of ten thousand five hundred twenty-two dollars and fifty cents ($10,522.50) as "reasonably commensurate with the actual necessary work performed" in representing the employee before the Office.[1]

At appellant's request, a hearing was held before an Office hearing representative on April 16, 1986. Presented at the hearing was a lengthy rebuttal and explanation of the fee request. The document consisted of a 19-page statement by the employee, accompanied by 63 exhibits. The material addresses the charges claimed by the attorney on approximately 65 different dates during his representation of the employee. The employee included an item by item list of these charges and has requested that 79.5 hours be disallowed. In addition the employee requested that the charges for 10.4 hours of work be reduced, as he felt the work done during those hours was essentially that of an errand boy or photocopy clerk. Appellant's reasoning as to why the various charges should be reduced was that it was his opinion that the service performed should not have taken as long as the attorney claimed in his fee request.

In response to the employee's document, the attorney submitted a 37-page response dated May 12, 1986. The attorney addressed item by item the various charges and hours claimed which the employee felt should be reduced. He explained in detail the necessity for each of the charges and hours spent. In addition, the attorney explained that he first saw the employee on January 18, 1980 to determine whether there was any basis for his proceeding with the claim. He stated that he charged the employee and was paid $750.00 as a retainer prior to his acceptance of the employee's case. The attorney further requested to increase his hourly charges to reflect his usual hourly charges for various periods during his representation of the employee.

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[1] The Office disallowed the 4.1 hours spent in preparation of the fee request, and 1.9 hours charged for photocopying the case file. The Office approved the attorney's requested hourly rate of $75.00.

By decision dated June 5, 1986 the Office hearing representative found that a fee of $10,522.50 was reasonably commensurate with the actual necessary work performed by the attorney in this case. The hearing representative further rejected the attorney's request to amend his fee petition to reflect the various changes in his hourly rates that occurred during the years he represented the employee.

Both the employee and the attorney appealed to the Board.

It is not the Board's function to determine the fee for representative services performed before the Office. That is a function within the discretion of the Office based on the criteria set forth in 20 C.F.R. section 10.145 and mandated by Board decisions. The Board's sole function is to determine whether the action by the Office constituted an abuse of discretion.[2] Generally, an abuse of discretion can be shown only through proof of manifest error, a manifestly unreasonable exercise of judgment, action of the kind that no conscientious person acting intelligently would reasonably have taken, prejudice, partiality, intentional wrong, or action against logic.[3]

The record shows that the Office took into consideration the attorney's services and the criteria set forth in its regulations in fixing the approved fee. While the employee alleged that the attorney should not have spent as much time as he spent on the case, the Office determined that the attorney had submitted documentation explaining why the disputed hours and tasks were necessary when they were performed. The Office concluded after a careful review of the record that a fee of $10,522.50 was reasonable. It is clear from the record that the Office gave full consideration to all the grounds upon which the attorney sought to justify his fee and the employee's comments with respect to it.

The Board finds that the action of the Office in approving the fee of $10,522.50 was not, as a matter of law, arbitrary or unreasonable and did not constitute an abuse of discretion.[4] The record itself does not disclose any manifest error, or arbitrary or capricious action of a kind and quality amounting to abuse of discretion, but on the contrary the record discloses that exercise of discretion by the Office in a manner not inconsistent with the facts and the applicable law.

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[2] *William Lee Gargus*, 25 ECAB 187 (1974).

[3] *Aldo Abatecola*, Docket No. 87-54 (issued February 17, 1987), and cases cited therein.

[4] *See Hazel J. Jones*, 26 ECAB 348 (1975), and cases cited therein.

The record further reveals that the attorney charged the employee and was paid $750.00 as a "retainer" for the initial review of the employee's case "prior to acceptance" of the case. The attorney's explanation for collection of the $750.00 was that it represented a retainer fee for him to determine whether he would represent the employee and that he did not actually begin representing the employee until May 8, 1980. While the Board finds the attorney's distinction of services is without merit, it finds that it was not improper for the Office to approve a fee while the attorney held $750.00 which he improperly collected from the employee in violation of 18 U.S.C. section 292 and 20 C.F.R. section 10.145(i).

Section 8127 of the Federal Employees' Compensation Act pertains to representative fees. That section states: "(b) A claim for legal or other services furnished in respect to a case, claim, or award of compensation under this subchapter is valid only if approved by the Secretary."[5] The regulations promulgated pursuant to section 8127 provide that no fee for representation services rendered in respect to a claim under the Act is valid unless prior approval of such fee has been obtained from the Office.[6] Subsection (i) of the Office's regulations provides criminal penalties under 5 U.S.C. section 292 for any person who receives a fee, other consideration or gratuity on account of services rendered with respect to a claim under the Act.

5 U.S.C. section 292 states as follows:

> "Whoever receives a fee, other consideration, or gratuity on account of legal or other services furnished in respect to a case, claim, or award for compensation under subchapter I of chapter 81 of title 5, unless the fee, consideration, or gratuity is approved by the Secretary of Labor—
>
> "Shall, for each offense, be fined not more than $1,000 or imprisoned not more than one year, or both."

Hazel Covington,[7] was a case before the Board where attorneys collected a legal fee from a claimant without prior approval of the Office, in violation of the applicable criminal and civil statutes and of the Secretary of Labor's regulations. The attorney alleged that they were unaware of section 8127(b) of the Act until after such collection. The Board held that it was improper for the Office to approve any fee while the attorneys held the amount of monies which they had collected from the claimant without prior approval. The Board further stated that until such time as the attorneys cleansed their hands and returned to the claimant the full amount collected, or in the alternative placed such amount in escrow, it would continue to be improper for the Office to approve any fee. In addition, the Board instructed the Office to forward the case record to the Office of the Solicitor for referral to the Department of Justice for consideration of criminal prosecution of some or all the attorneys under the provisions of 18 U.S.C. section 292 if the attorneys failed to cleanse their hands within 30 days from the date of the Board's decision.

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[5] 5 U.S.C. section 8127.

[6] 20 C.F.R. section 10.145.

[7] 25 ECAB 215 (1974).

On further examination of *Covington*, the Board finds that the procedures suggested therein are not based on the Federal Employees' Compensation Act and attendant regulations or other criminal statutes and therefore is outside statutory authority of the Board.

Section 8127 of the Federal Employees' Compensation Act pertaining to representative fees only provides that they must be "approved" to be "valid." The statute does not address invalid fees and does not impose sanctions for invalid fees. The Office's regulations promulgated pursuant to section 8127 of the Act delineate the procedures for a representative to request approval of a fee as well as the criteria that the Office will use in fixing the fee. The regulations, 20 C.F.R. section 10.145(i), further provide that a representative who receives a fee without approval by the Office shall be guilty of a misdemeanor under 18 U.S.C. section 292. Section 10.145(i) of the regulations states however that escrow deposit of funds into the hands of a third party until receipt of the Office's approval is not considered receipt or collection of a fee. In lieu of escrow, a representative can be prosecuted under 18 U.S.C. section 292 with the criminal penalties of a fine of not more than $1,000.00 or imprisonment not to exceed one year, or both. The statutes and regulations cited above provide only that a representative's fee under the Act must be approved in order to be a valid, collectable fee, and impose criminal sanctions upon a representative who collects a fee without prior approval by the Office. The *Covington* case, however, went one step beyond the statutes and regulations and stated that the Office could not approve a fee if the representative had collected a fee prior to the Office's approval. This principle is not suggested or supported by the applicable statutes or regulations. The procedures delineated in the Office's regulations for approval of a representative's fee do not provide that the Office cannot approve a fee after a fee has been collected. The applicable law only provides that a fee collected prior to approval is not a valid fee and that the person who collected the fee is subject to criminal prosecution. Thus, the Board concludes that the Office is not prohibited from approving a fee after a fee has been collected. The Office is permitted to approve a fee regardless of whether the attorney is withholding money from a claimant in violation of 18 U.S.C. section 292 and 20 C.F.R. section 10.145(i).[8] The remedy against a representative who collects a fee without the prior approval by the Office is not withholding approval of a fee but rather the criminal sanctions imposed by 18 U.S.C. section 292 and 20 C.F.R. section 10.145(i).

The June 5, 1986 decision of the Office of Workers' Compensation Programs is hereby affirmed.[9]

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[8] To the extent that *Covington* is inconsistent with the holding herein, *Covington* is overruled.

[9] The $750.00 the employee paid the attorney should be credited against the approved fee of $10,522.50.

In the Matter of MATHEW S. DIXON *and* VETERANS ADMINISTRATION, VETERANS ADMINISTRATION MEDICAL CENTER, Mountain Home, Tenn.

Docket No. 87-1785; Submitted on the Record;
Issued January 29, 1988

Before MICHAEL J. WALSH, GEORGE E. RIVERS, WILLIE T.C. THOMAS

The issues are: (1) whether appellant's exposure to chemicals and fumes caused or precipitated his asthmatic or allergic rhinitis conditions; (2) if the exposure did not cause appellant's condition, whether the exposure caused appellant to become permanently sensitive to the fumes to the point that he was unable to perform the duties of his position; and (3) whether appellant sustained an aggravation of asthmatic or allergic rhinitis conditions which caused a permanent lung impairment or whether such an aggravation was only temporary.

On June 29, 1981 appellant, then a 46-year-old recreation assistant, filed a claim for compensation for allergy to x-ray solutions and hypertension. He indicated that he first became aware of the illness on November 16, 1974 and was requesting compensation and buy back of leave for the period November 5, 1979 to January 24, 1981.

The employing establishment reported that appellant originally sought and was denied disability retirement; that appellant returned to work and underwent a fitness-for-duty examination; and that the physicians determined that appellant should not return to his position in radiology as a diagnostic radiologic technologist and be exposed to chemical fumes associated with his former position. The employing establishment further reported that appellant had been detailed and that it was currently attempting to reassign him to a position with a lower grade for his safety.

The employing establishment submitted appellant's medical records. In a November 27, 1979 report Dr. Ballard A. Blevins, a family practitioner, reported that he first saw appellant on November 5, 1979, complaining of chest pain which appellant attributed to anginal pain from diabetes mellitus, allergies, high blood lipids and hypertension. Dr. Blevins noted that appellant had a history of chest pain, the cause of which had not been diagnosed. He recommended to appellant that he stop work effective November 5, 1979.

In a November 19, 1979 application for disability retirement, Dr. Harold E. Ross, chief of radiology service at the employing establishment and appellant's supervisor, stated that appellant had complained of chest pain when attempting to carry out his duties. He reported that chemical fumes aggravated appellant's allergy which in turn often resulted in chest pain.

In a February 20, 1980 report, Dr. Alfred J. Bennett, an osteopath and Dr. Paul Borisuk, an internist, reported in a disability retirement examination that appellant had moderate exogenous obesity, type IV hyperlipidemia, subacute prostatitis, mild adult type onset diabetes mellitus not confirmed by conclusive laboratory data and atherosclerotic heart disease, not found. The physicians indicated that appellant had a vasomotor rhinitis by history, aggravated by fumes from x-ray solution. The physicians reported that appellant had no evidence of atherosclerotic heart disease to explain the chest pain. The physicians concluded that while appellant's multiple subjective complaints affected his ability to perform his job duties, appellant was not disabled to the extent that he could not perform the requirements of his current job.

In a May 20, 1980 report, Dr. John B. McKinnon, an internist and allergist, stated that he had treated appellant for severe allergic rhinitis; that, by history, appellant's difficulty was greatly increased and his nasopharynx was severely irritated by exposure to the chemical solution he had to work with in performing his job; and that further exposure should be totally avoided. In another May 28, 1980 report, Dr. Charles T. R. Underwood stated that appellant was unable to return to his position of a radiologist technologist and that appellant's disability was expected to last 12 months or more. He listed the diagnoses as allergy to x-ray solutions, hyperlipidemia, diabetes mellitus, angina pectoris and hypertension.

In a January 26, 1981 note Dr. Joshua Grossman, a Board-certified internist, recommended that appellant avoid exposure to x-ray developing fumes and developing fluids and that he be considered for reassignment. Dr. Ross stated that appellant could not perform his duties as a radiological technologist without being exposed to fumes of x-ray developing fluids. In a February 3, 1981 report, Dr. Grossman and Dr. Bennett indicated that they concurred with the recommendations of Dr. Underwood and Dr. McKinnon in that appellant's allergic rhinitis was significantly severe such that he would be unable to perform the duties of a radiologist because he had to avoid exposure to x-ray developing fluids and developing fumes. Dr. Grossman and Dr. Bennett stated that they expected the allergy to persist indefinitely.

In a December 13, 1982 decision, the Office found that appellant had not met his burden of proof in establishing fact of injury in the performance of duty.

Appellant requested reconsideration. He submitted a May 28, 1981 report from Dr. Grossman and Dr. Bennett who stated:

> "Clinical diagnostic impression at this time is: (1) By history and by observation of the employee with correlation to a recent Veterans Administration Center Mountain Home hospitalization, allergy to x-ray developing fumes or fluids is strongly suspected in this individual.
>
> "Recommendation—It is felt that this allergy to these developing fumes or fluids is of significance to this individual to render him unable to perform the duties of the Diagnostic Radiologic Technologist for a period of a year or more."

Appellant also submitted a September 20, 1982 report from Dr. John E. Gehman, a family practitioner, who stated:

> "On examination today he is coughing with a dry, tight, nonproductive cough, and breathing heavily. Auscultation of lungs reveals prolonged inspiratory and expiratory phases of respiration with expiratory wheezes throughout both lung fields.
>
> "This man obviously has well-documented history of severe allergy to inhalants in his occupational environment where he

> has worked for 26 years with extensive pulmonary involvement. In addition he obviously has moderate to marked chronic obstructive pulmonary disease of a permanent nature secondary to this exposure. Thirdly, he has extensive physical disability which not only precludes him from engaging in his usual occupation but any occupation requiring any but the barest minimum of exertion.
>
> "In view of the fact that this man has never smoked, there can be no question concerning the cause of his problem. He is obviously totally disabled where his usual occupation is concerned, and additionally has sustained permanent injury to his lungs. Not only is this man entitled to disability benefits, in my opinion he should receive compensation for injury as well."

In a February 9, 1983 note, Dr. Ross indicated that due to appellant's alleged allergy to x-ray solution fumes, work was not available to him in the Radiology Department. Dr. Ross stated that from May 30, 1980 to January 23, 1981 appellant was on leave without pay. Work therefore was not offered to him and he did not request work in the Radiology Department during the period. In a February 10, 1983 note, an official at the employing establishment indicated that appellant was reassigned to the position of recreation assistant on July 26, 1981 at a lower grade but the same salary as he had in his position as a diagnostic radiologic technologist.

In an April 25, 1984 letter, the Office requested that appellant specify the exposure he was claiming. Appellant submitted a May 4, 1984 affidavit stating that he had been continuously employed as an x-ray technician from August 1959 to June 16, 1981. He indicated that during this period he was exposed to many toxic, irritating fumes in his job by inhalation and direct contact. He reported that he had to mix chemicals and handle solutions needed for x-ray processing and contacted the solutions on the developed film. He submitted a list of the chemicals to which he was exposed including potassium bromide, sodium sulfite, sodium carbonate, phenindione, hydroquinone, glutaraldehyde, acetic acid, sodium thiosulfate or ammonium thiosulfate, and potassium alum, chrome alum or aluminum chloride.

In a May 25, 1984 memorandum, an Office medical adviser stated that the chemicals used in x-ray processing had a very low allergic and irritant factor. He indicated that since 1975 all major hospitals have had automatic film processing units in which there was no contact with chemicals. He commented that appellant had an undiagnosed allergic rhinitis with subsequent development of allergic bronchitis. He stated that there was no proof that appellant's contact with on-the-job chemicals was the precipitating factor. He noted that Dr. Gehman, in diagnosing obstructive lung disease, gave no objective proof and performed no pulmonary function tests. The medical adviser recommended that appellant be evaluated by an allergist and a pulmonologist.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Michael N. Miller, a Board-certified allergist and internist, for an examination. In a July 23, 1984 report, Dr. Miller submitted his notes from examinations of July 9, 1984 and July 19, 1984. He stated:

> *"PULMONARY FUNCTIONS:*
>
> "Pulmonary spirometry revealed an FVC of 67% predicted, FEV_1 of 71% predicted and an FEF_{25-75} of 54% predicted. The FEV_1/FVC ratio was 77%. Following aerosolized bronchosol his pulmonary functions improved as follows: FVC 76% predicted, FEV_1 78% predicted and FEF_{25-75} 56.7% predicted. This improvement is marginal at the present time but tends to suggest reversible airway disease.
>
> "PULMONARY FUNCTIONS: Several days later a Methacholine Inhalation Challenge Test was performed to confirm the presence or absence of reactive airway disease. This test demonstrated a greater than 20% drop in FEV_1 and five breaths of Methacholine Chloride 5 mg per ml. This indicates the presence of reactive airway disease consistent with bronchial asthma.
>
> "X-RAY STUDIES: Chest x-ray shows some mild minimal peribronchial cuffing which is not specific and occasionally seen in asthmatics. Otherwise unremarkable. Sinus x-rays were essentially clear.
>
> "The Complete Skin Test Survey to inhalant allergens showed no clinically significant skin reactions.
>
> "ASSESSMENT:
>
> > "1. Nonallergic Bronchial Asthma: Documented by positive Methacholine Challenge Test
> > "2. Non-allergy (Vasomotor) Rhinitis
> > "3. History of Hyperlipidemia
> > "4. History of Hypertension
> > "5. History of Angina Pectoris (Nonconfirmed)

> "COMMENT:
>
> "Mr. Dixon's asthma is most likely a permanent condition that began in 1974 and has been chronic since. He states that his symptoms have become more progressive with time. It is impossible to document a cause-effect relationship between the onset of his asthma and exposure to possible chemical contaminants in the x-ray developing lab. If an allergic reaction to these chemicals was the only cause of his asthma, one would expect his asthma to remit after removal from this environment. However the continual progression of his disease would provide circumstantial evidence that the primary cause of his asthma is not secondary to the exposure to the chemicals in the radiology department.
>
> "It is much more likely that he coincidentally developed asthma while working in the radiology department. After developing asthma, his lungs would become super sensitive to any types of irritants such as cigarette smoke, sulfur dioxide or any other airborne pollutants. It is thus reasonable to expect that if there was significant indoor pollution around the x-ray processing machine, this could perhaps aggravate Mr. Dixon's asthma condition. While it is impossible to prove one way or the other, it is my judgment that his exposure in the radiology lab resulted in the aggravation of his asthmatic condition which probably spontaneously developed coincidentally during the time of his employment at the VA hospital."

In his July 23, 1984 report, Dr. Miller stated:

> "A literature search regarding the chemicals to which he could be potentially exposed, revealed that the sodium sulfite is known bronchial irritant. There are no cases to my knowledge of this chemical actually inducing reactive airway disease. However exposure to sulfite chemicals can aggravate a preexisting asthma condition.
>
> "If there is significant pollution of the air in the radiology department with a sulfiting agent it is possible that this could act as a respiratory irritant to his non-allergic asthma condition. The fact that the onset of his asthma occurred while he was working in the radiology department is not of and by itself direct evidence that exposure to developing chemicals produced his asthma. As you are aware, asthma can occur in general population at any age and at any time for unknown reasons. It is very likely that the onset of his asthma is coincidental to his

> exposure to the developing chemicals in the radiology lab. However once he developed bronchial asthma, any known bronchial irritants that might be present in the laboratory air could provoke or trigger his asthma. The fact that his bronchial asthma has persisted and become more progressive since his removal from the radiology lab would suggest that the chemical exposure in the lab is not the primary cause of his asthma."

In a September 4, 1984 memorandum the Office medical adviser concurred with Dr. Miller's conclusions and opined that the temporary aggravation ceased when appellant was removed from the radiological laboratory.

In a November 2, 1984 decision the Office rejected appellant's claim on the ground that the medical evidence showed that appellant had a temporary aggravation of his asthmatic condition which ceased when he was removed from the environment of his former position.

In a July 17, 1985 letter, appellant requested reconsideration. He submitted a February 20, 1985 report from Dr. Donald F. Tarr, a family practitioner. Dr. Tarr stated that he never found appellant to have any restriction of his breathing or wheezing which might be construed as asthma in the time he had examined appellant. He indicated that he did not see appellant between 1978 and his current examination. He noted that appellant had a slightly inflamed pharynx and inflammation of the nasal passages. He diagnosed allergic rhinitis and stated:

> "I do not feel that Mr. Dixon should be working in the radiology department since the rhinitis was caused directly by the environment of the developing fluid and fumes. He has been exposed to this area for 26 years on the job. When his resistance gets too low he would be susceptible to complications.
>
> "Mr. Dixon was diagnosed an asthmatic 4 years ago by another physician. His asthmatic condition is secondary to his allergic rhinitis. He had never previously had asthma. His acute asthmatic episodes are brought on when his resistance is lowered by the allergic rhinitis attacks.
>
> "In a man this age without any previous history of asthma, there would have to be a precipitating factor and the allergic rhinitis would be the obvious cause."

In an August 8, 1984 memorandum, a second Office medical adviser stated that Dr. Tarr's report did nothing to change the fact that asthma would remit after removal from the environment if an allergic reaction was the only cause of the asthma. He indicated that Dr. Tarr did not present scientific support and only a minimum of objective data in support of his opinion.

In a December 20, 1985 merit decision, the Office denied appellant's request for modification.

In a July 14, 1986 letter, appellant again requested modification. He stated that he was submitting reports from Dr. Claude A. Frazier, a Board-certified allergist.

In a July 25, 1986 letter, the Office stated that no evidence was submitted with appellant's letter that had not been previously reviewed and considered in the Office's December 20, 1985 letter. It concluded that there had been no additional evidence which would warrant reopening or reconsideration of the previous decision.

Appellant appealed to the Board. In a December 16, 1986 order, the Board noted that the record did not contain a copy of Dr. Frazier's report which appellant stated that he had submitted. The Board therefore set aside the Office's July 25, 1986 decision and remanded the case for reconstruction of the case record.[1]

Appellant submitted reports from Dr. Frazier. In a February 6, 1986 report, Dr. Frazier submitted his examination summary, indicating that appellant began having shortness of breath and smothering five to six years after beginning work at the employing establishment. Appellant related that his symptoms occurred almost every day at work but he had no symptoms on days off. He indicated that his symptoms were aggravated by x-ray solution from the x-ray department. He reported that he was better during his absence from work from October 1979 to December 1980. In May 1981 he again experienced the smothering and shortness of breath with his first episode of wheezing. Appellant stated that he currently experienced smothering, shortness of breath and slight wheezing occurring almost every night which was aggravated by fatigue and exertion. In a February 6, 1986 report, Dr. Frazier stated:

> "Mathew S. Dixon was in my office for the allergy evaluation. He has asthma and allergic rhinitis because of intrinsic and extrinsic factors. Inhalants, foods, and bacteria may play a role in the symptoms. The chief inhalants are dust, feathers, molds and pollens. It is evident from his history of working in the x-

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[1] Docket No. 87-127 (Order Remanding Case issued December 16, 1986)

> ray department for several years being exposed to fumes brought on the symptoms. However, he was definitely better when he was out of work about 2 years. Once the asthma symptoms begin then other factors play a role. His pulmonary function is below normal. He has a history of elevated blood pressure."

In a February 24, 1986 report, Dr. Frazier stated:

> "Regarding our telephone conversation about our mutual patient, Mathew Dixon, I advised him to get a pulmonary function study before being exposed to x-ray fumes at work and then getting another pulmonary function done after exposure, which he did. There is a drop in the FVC and the graph shows a shorter expiration time on the 2nd test. Patient had clear drainage from nose, sneezing, shortness of breath, wheezing and he missed 3 days from work (after exposure to fumes). The pulmonary function study done here on February 3rd was FVC 65% and FEV_1 70%. The pulmonary function done 2-17 was definitely much lower with FVC only 29% and the FEV_1 at 25%."

In a March 5, 1987 memorandum, the second Office medical adviser noted that Dr. Frazier presumed that working in the x-ray department for several years "brought on" appellant's symptoms, followed by definite improvement when appellant stopped working. The medical adviser indicated that this statement was not incompatible with what the Office had already accepted, a temporary aggravation of asthma which ceased on July 26, 1981. He stated that if Dr. Frazier meant "brought on" in a primary sense, he was speculating on historical data. He commented Dr. Frazier's opinion on causal relationship was essentially a reiteration of appellant's statements. The medical adviser pointed out that the results of the pulmonary function tests given by Dr. Frazier were almost identical to those given by Dr. Miller. He concluded that appellant therefore had no functional deterioration since 1984. He noted that Dr. Frazier reported worsening of pulmonary function after exposure to x-ray fumes. He stated that this would be compatible with another temporary aggravation as previously allowed. He concluded that Dr. Frazier's findings were compatible with the status quo unless appellant was exposed to fumes. He noted that Dr. Frazier's postulated other extrinsic factors having a role in the symptoms based on his history but did not support his opinion with objective tests.

In a March 18, 1987 merit decision the Office denied appellant's request for reconsideration.

The Board finds that the case is not in posture for decision due to a conflict in the medical evidence.

Dr. McKinnon reported that appellant had severe allergic rhinitis which was aggravated by exposure to the chemical solution appellant had to work with in his job. He recommended that appellant should avoid further exposure to the fumes. Dr. Grossman and Dr. Bennett also reported that appellant had an allergy to the fumes he used in his work which rendered him unable to perform the duties of his position. Dr. Gehman reported that appellant had a severe allergy to the chemical fumes at work which caused marked chronic obstructive pulmonary disease of a permanent nature and thus rendered appellant totally disabled for his position as a radiological technician. He specifically pointed out that appellant had no history of smoking. Dr. Tarr also diagnosed allergic rhinitis which he stated was directly caused by exposure to developing fluid and fumes. He concluded that appellant's asthmatic condition was brought on when his resistance was lowered by allergic rhinitis attacks. He pointed out that appellant had no history of asthma prior to his exposure to chemicals and fumes at work. The reports of Drs. McKinnon, Grossman, Bennett, Gehman and Tarr lacked rationale in explaining how the exposure to developing fluids and fumes caused appellant's allergic rhinitis. These physicians, however, consistently stated that appellant's allergic rhinitis was due to his exposure to chemicals and fumes at work and that the allergic rhinitis caused appellant to be disabled for his position as a radiological technician.

On the other hand Dr. Miller stated that appellant developed asthma coincidentally with and independently of his work with chemicals and fumes. He commented that after the development of asthma, appellant's lungs would become very sensitive and chemical irritants from x-ray processing could cause an aggravation of this condition. Dr. Miller, however, did not adequately explain why the asthmatic condition he diagnosed was not causally related to appellant's long-term exposure to chemicals and fumes at work. His report is also vague and speculative on whether the chemicals and fumes aggravated the asthmatic condition he diagnosed. His report is in conflict with the reports of Drs. McKinnon, Grossman, Bennett and Gehman who diagnosed allergic rhinitis and not asthma and the report of Dr. Tarr who related appellant's asthma to allergic rhinitis. The case must therefore be remanded to resolve the conflict between Dr. Miller and Drs. McKinnon, Grossman, Bennett, Gehman and Tarr on the diagnosis of appellant's condition, the cause of the diagnosed condition and the affect of the diagnosed condition on appellant's ability to perform the duties of his former position as a radiological technician.

On remand, the Office should prepare a detailed statement of accepted facts, specifically the chemicals that appellant was exposed to in his work as a radiological technician. The Office should then refer appellant, together with the statement of accepted facts and the case record, to an appropriate impartial specialist for an examination. The specialist should be requested to give a diagnosis of appellant's condition and state whether the diagnosed condition was caused or precipitated by the exposure to chemicals and fumes in appellant's work or whether the exposure interacted with any preexisting or spontaneously developed condition to cause a new condition which prevented appellant from performing his former position.[2] The specialist should also be requested to state whether appellant's exposure to chemicals and fumes caused a permanent impairment of his lungs as evaluated in accordance with the A.M.A. *Guides.*[3] After further development as it may find necessary, the Office should issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated March 18, 1987, December 20, 1985 and November 2, 1984 are hereby set aside and the case remanded for further action in accordance with this decision.

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[2] See *Gerald D. Alpaugh*, 31 ECAB 589 (1980); *Carl E. Starnes*, 33 ECAB 1996 (1982).

[3] American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (2nd ed. 1984).

In the Matter of ISABEL GAMBOA *and* U.S. DEPARTMENT OF AGRICULTURE, SEQUOIA NATIONAL FOREST, Porterville, Calif.

Docket No. 87-2011; Submitted on the Record;
Issued January 29, 1988

Before MICHAEL J. WALSH, GEORGE E. RIVERS, DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request to subpoena witnesses for a hearing before an Office hearing representative.

On July 19, 1985 appellant, then a 41-year-old casual[1] firefighter, "felt pain in [his] left knee" while "coming down [a] mountain." He stopped work the next day, and, except for a brief period, from September 19 through 21, 1985, has not returned to work.

Appellant first obtained medical care at the Sierra View District Hospital on July 22, 1985 where he was found to have degenerative changes in his left knee upon x-ray examination.

In a report dated July 31, 1985 Dr. Timothy J. Perrin, an orthopedic surgeon, indicated that appellant had been referred to him by the hospital for "left knee pain of 12 days' duration." In a progress note dated August 14, 1985 Dr. Perrin indicated that a review of an arthrogram revealed a "definite horizontal tear of the medial meniscus posteriorly."

The Office of Workers' Compensation Programs accepted that appellant sustained a left knee strain and medial meniscus tear as a result of the employment injury on July 19, 1985, and began payment of temporary total disability compensation.

A surgery note dated October 29, 1985 by Dr. Perrin indicated that appellant underwent an "arthroscopic partial left medial meniscectomy with chondroplasty of the patella and resection of synovial plica" that day. Dr. Perrin's progress notes dated December 11, 1985 indicated that appellant was "feeling progressively better."

Dr. Perrin's progress note dated February 7, 1986 indicated that appellant was "still complaining of pain in the knee;" that there was "no measurable atrophy of the thigh" and "apparent normal strength in the knee and full range of motion;" and that he could "return to work without restrictions." An attending physician's report dated February 10, 1986 indicated that the anticipated permanent effect of the injury was "traumatic arthritis of the left knee."

By letter dated February 26, 1986 appellant informed the Office that he had moved to Fremont, California.

By letter dated March 5, 1986 the Office informed appellant that the medical evidence indicated he was not disabled after February 7, 1986 and that he was therefore not entitled to temporary total disability compensation after that date.

By letter dated April 7, 1986 the Office informed appellant that he should locate an orthopedic physician in his new location and arrange for an evaluation so that he may eventually be considered for an award for permanent impairment when his condition becomes permanent and stationary.

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[1] The employing establishment indicated that appellant worked "on call when needed during fire season only."

In a report dated May 29, 1986 based on an examination on April 28, 1986 Dr. Edmundo Ruiz Davila, a general practitioner, indicated that appellant complained of "left knee pain which has slowly worsened since his surgery," and that he had referred appellant to a Dr. Blecha for an orthopedic consultation.

In a report dated May 20, 1986 Dr. Richard M. Blecha, a Board-certified orthopedic surgeon, discussed appellant's history and the findings on examination and indicated that as "he has some arthritis and . . . no longer has an intact medial meniscus, . . . his knee cannot be totally normal, [but] he should have a good knee which is functional for most purposes."

By letter dated July 11, 1986 the Office referred appellant's position description as well as the physical requirements of the position to Dr. Blecha and requested that he provide an opinion on whether appellant was capable of returning to work in his previous position.

In a report dated September 10, 1986 Dr. Blecha stated:

> "[Appellant] has slight pain in the knee with early degenerative arthritis being present. He probably should have some treatment with anti-inflammatory medications for his arthritis and should perform specific exercises to strengthen his quadriceps muscle. While he does have these problems I do not believe that they are such that they preclude his employment at the job described."

By compensation order dated November 7, 1986, incorporating by reference a memorandum to the Director, the Office terminated appellant's temporary total disability compensation effective February 7, 1986 on the ground that the reports by his treating physicians, Drs. Perrin and Blecha, indicated he was not disabled for work after that date.

Appellant moved to Hollister, California and visited Dr. Ardeshir Rahmati, a urological and orthopedic surgeon.

In a letter to the Office dated November 12, 1986 Dr. Rahmati requested that the Office authorize "arthroscopy, possible arthrotomy and possible meniscectomy," and enclosed a report of an arthrogram performed on November 7, 1986. The report indicated that appellant had a "large tear of the left medial meniscus involving the posterior and central portions of the meniscus." An accompanying note indicated that appellant was disabled from November 5 through "possibly" December 5, 1986.

On November 25, 1986 the Office referred the medical evidence to Dr. Lesley J. Anderson, an orthopedic surgeon acting as an Office medical consultant, for an evaluation of whether the surgery suggested by Dr. Rahmati should be authorized.

By letter dated November 19, 1986, received by the Office on December 1, 1986, appellant requested a hearing.

In a report dated December 14, 1986 Dr. Anderson indicated that it was "possible for a meniscus which has previously been torn and treated surgically to retear or further degenerate with time," but that as Dr. Rahmati did not provide any "rationale, [findings on] physical examination or indications for surgery," the doctor should be requested to provide such information before the surgery is authorized.

By letter dated January 6, 1987 [2] the Office requested that Dr. Rahmati provide "a narrative medical report explaining the relationship between the currently diagnosed meniscal tear and [appellant's] July 19, 1985 injury, as well as a report of a physical examination of the knee," and enclosed a copy of Dr. Anderson's December 14, 1986 report.

In a report dated February 4, 1987 Dr. Rahmati indicated that he had suggested the operative procedure based on the "clinical findings" and the arthrogram report which showed an "extensive tear of left medial meniscus involving [the] posterior and central portions."

By letter dated March 11, 1987 the Office referred appellant's medical records dating back to the July 19, 1985 employment injury to Dr. Rahmati and requested that he provide his "opinion, with reasons, as to whether the condition diagnosed by the November 7, 1986 arthrogram [was] causally related to the July 19, 1985 work injury and the subsequent surgical procedure performed by Dr. Perrin on October 29, 1985."

In a report dated April 16, 1987 Dr. Rahmati stated:

> "I do feel that the difficulty [appellant] is experiencing is due to his original injury of July 19, 1985.

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[2] The date indicated on the letter is January 6, "1986"; however, the correct date should obviously be January 6, 1987.

* * *

> "I feel that the patient should have surgical treatment of the meniscus to help resolve his difficulty so that he can return to work as soon as possible."

Appellant's representative then filed a "Request for Appearance of Witnesses and Subpoena Duces Tecum" dated June 12, 1987 asking that: (1) Drs. Blecha and Anderson be compelled to appear at the hearing, bringing with them all the records in their possession regarding appellant, so that they may be crossed-examined; (2) the Office issue a subpoena duces tecum to Dr. Rahmati, ordering that the doctor appear at the hearing, bringing with him all the records in his possession regarding appellant; (3) the employing establishment confirm that its memorandum dated November 29, 1984 describing appellant's position is a "position description" rather than a "position classification;" and (4) as the November 29, 1984 memorandum was numbered as page 5, the rest of the pages of the memorandum be provided.

By a decision dated July 20, 1987 the Office's Branch of Hearings and Review denied appellant's request for subpoenas, finding that: (1) Dr. Anderson's presence at the hearing was not reasonably necessary because the doctor merely provided guidance to the Office in the development of the medical evidence by reviewing the evidence to determine whether additional surgery should be authorized; and (2) the presence of Drs. Blecha and Rahmati was not reasonably necessary because, as they were appellant's own physicians, appellant was responsible for providing evidence from them by deposing them or requesting that they submit additional written reports or voluntarily attend the hearing.[3]

The Board finds that the Office did not abuse its discretion in refusing to subpoena Drs. Anderson, Blecha and Rahmati.

Under section 8126 of the Federal Employees' Compensation Act, the Office has discretion, in any matter within its jurisdiction, to "issue subpoenas for and compel attendance of witnesses within a radius of 100 miles." [4]

The Office refused to subpoena Dr. Anderson on the ground that the doctor's involvement in the case was limited to guiding the Office in the development of the medical evidence, so that his presence at the hearing was not reasonably necessary. As the Office correctly noted, Dr. Anderson reviewed the medical evidence solely to determine whether the surgery suggested by Dr. Rahmati should be authorized. Dr. Anderson's opinion was thus not relied upon by the Office in its November 7, 1986 decision terminating compensation, and would not be directly relevant to the issues at a hearing based on that decision.[5] The Board therefore finds that the Office did not abuse its discretion under the circumstances of this case by refusing to subpoena Dr. Anderson.

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[3] After the issuance of this decision, appellant's representative submitted additional letters, dated August 4, September 1 and September 9, 1987, as well as additional reports by Drs. Blecha and Rahmati. The Board lacks jurisdiction to consider this evidence, however, because it was not before the Office as of its final decision. *See* 20 C.F.R. section 501.2(c).

[4] 5 U.S.C. section 8126; 20 C.F.R. section 10.133(b). *See George Lanzy*, 35 ECAB 746 (1984).

The Office refused to subpoena Drs. Blecha and Rahmati on the ground that as these doctors were appellant's own treating physicians, appellant could provide evidence from them by means other than a subpoena. The Office noted that appellant could request that the doctors submit additional written reports, depose them, or request that they appear at the hearing voluntarily. Appellant's representative did not indicate what she expected to prove by compelling the presence of these doctors at the hearing. Nor did the record show that the doctors were unwilling to provide the desired evidence by submitting additional written reports, by depositions, or by voluntarily appearing at the hearing.[6] The Board therefore finds that the Office did not abuse its discretion under the circumstances of this case by refusing to subpoena Drs. Blecha and Rahmati.

Appellant's representative argued on appeal that the "taking of a deposition is a heavy financial burden" which appellant was unable to bear. The Board notes that a deposition is not the only means by which appellant could establish his entitlement to further compensation in this case. Appellant may submit a comprehensive narrative medical report discussing appellant's history and the findings on examination, and establishing, based on medical rationale, that appellant continued to be disabled for work after February 8, 1986 due to his July 19, 1985 employment injury.[7]

Appellant's representative also argued that the Office's July 20, 1987 decision did not address appellant's request that the employing establishment provide further information regarding appellant's job description and contended that the record did not contain "annotations of phone conversations which had occurred between the representative and the [Office] hearing representative." The Board notes that the job description and the list of physical requirements provided by the employing establishment are sufficient for the purpose of determining whether appellant is physically capable of returning to that job. The Board further notes that the record does contain memoranda of phone conversations between appellant's representative and the Office staff, including an Office hearing representative, on April 3 and June 12, 1987 as well as a "memorandum of phone conversation of August 17, 1987" submitted by appellant's representative.

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[5] *See* FECA Bulletin 84-32 (issued June 28, 1984). (Where an Office medical consultant's opinion is relied upon by the Office in reaching a decision which is then the subject of a hearing, it would be reasonable to subpoena the medical consultant upon appellant's request.)

[6] *See George Lanzy*, 35 ECAB 746 (1984). *See also Norman Bruneau*, 38 ECAB 746 (1987). After the Office's decision refusing to issue the requested subpoenas, additional reports were submitted by Drs. Blecha and Rahmati. *See* note 3, *supra*.

[7] *See Paul D. Weiss*, 36 ECAB 720 (1985).

The decision of the Office of Workers' Compensation Programs dated July 20, 1987 is hereby affirmed.

In the Matter of STEVEN M. GOURLEY, Executor of the Estate of LOUISE E. GOURLEY, *and* U.S. POSTAL SERVICE, POST OFFICE, Los Angeles, Calif.

Docket No. 86-2187; Hearing January 25, 1988;
Issued January 29, 1988

Appearances: *Steven Gourley, Esq.*, Executor of Estate of *Louise Gourley; Sheldon G. Turley, Jr., Esq.*, for the Director, Office of Workers' Compensation Programs.

Before MICHAEL J. WALSH, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that the employee had a 25 percent loss of wage-earning capacity effective October 26, 1979.

On June 27, 1977 the employee, then a 56-year-old general clerk, filed a claim alleging that factors of her federal employment had aggravated "degenerative bone disease" at L-2 and L-3. In statements submitted with her claim the employee asserted that the intermittent bending and stooping during her eight hour workday required to perform her filing, copying, paging and other duties had aggravated her back condition. On October 26, 1978 the employee filed a claim for "loss of pay [which] amounted to approximately 50% of working time and increasing during duration of illness." The employing establishment reported on the claim form that the employee's general clerk duties involved typing, answering phones, filing and keeping records and that the employee had used annual and sick leave and leave without pay to cover her absences from work. It subsequently reported on April 23, 1980 that the employee "has been working 4 hours per day during most of the period 1977 to present except for periods of hospitalizations."

Appellant, the employee's son and authorized representative and now executor of the employee's estate, submitted a June 2, 1977 report by Dr. Richard C. Small, Board-certified in therapeutic radiological physics, and an August 8, 1977 report by Dr. David B. Horner, a Board-certified orthopedic surgeon. Dr. Small reported the employee had a history of a left mastectomy in 1964 for cancer of the breast and that in "1975, she developed back pain which was found to be due to metastatic bone disease, and which totally and permanently disabled her." Dr. Horner reported the employee was totally disabled due to "severe back disease with sciatic neuralgia secondary to degenerative bone changes and spondylitis of the spine without being totally able to rule out the possibility of metastatic disease." Appellant also submitted July 27, 1977 and March 22, 1978 reports by Dr. Marvin J. Rosenburg, a Board-certified internist. Dr. Rosenburg reported on July 27, 1977 that the employee's back pain had appeared in 1975 and had required hospitalization in 1977. He opined she had totally disabling "severe back disease caused by degenerative bone disease associated with sciatic neuralgia," and stated that while there was a "possibility of metastatic cancer to the bone, . . . this diagnosis is not considered the most probable." On March 22, 1978 Dr. Rosenburg opined that the employee has a "chronic and acute back sprain" and degenerative disc disease, that "the intensity and severity of her symptoms has been directly related to the type of work she does," and that the "mechanical lifting, bending, etc. performed at work has aggravated her back sprain and has contributed to its long duration."

In further support of the claim appellant submitted July 25, 1978 and January 15, 1979 reports by Dr. Theodore H. Wallace, a Board-certified orthopedic surgeon, and a December 15, 1978 report by Dr. Rosenburg. Dr. Rosenburg opined that the employee had "chronic cervical, dorsal and lumbosacral back sprain which has been markedly aggravated by her employment and by the conditions and by the physical demands of her employment" and was totally disabled for her usual work. He stated it was no longer believed that metastatic breast cancer was a factor in the development of the employee's back pain. Dr. Wallace concluded in his latter report that the employee should be restricted to sedentary work due to her employment-related back condition.

On November 14, 1978 the employee sustained multiple bruises and cervical, dorsal and lumbosacral sprains when she pulled out a file drawer which fell on her knees. Dr. Rosenburg reported on November 29, 1978 that the employee would be disabled for her usual work from the date of injury until December 11, 1978. She returned to her part-time work following this date and continued to work part-time at the recommendation of Dr. Rosenburg.

In a letter dated March 21, 1979 appellant stated that although the employee was working part-time no more than four hours a day, "her co-workers are making efforts to relieve my mother of the constant stooping and bending as well as other deleterious job functions which she is required to do." According to an undated memorandum by a claims examiner of the Office concerning a March 26, 1979 meeting between the examiner and appellant, the employee often felt disoriented due to pain and medication and "others at work apparently do most of her job for her."

In a March 27, 1979 report Dr. Wallace reiterated that the employee could perform only sedentary work and opined that the "description of the patient's present work activities certainly appears to be beyond those of the recommended work limitations."

The employing establishment, by letter dated April 18, 1979 submitted a description of the duties and physical requirements of the employee's position of general clerk which it stated involved standing, lifting approximately 20 to 25 pounds, sitting, reaching, stooping and walking. According to an undated Office memorandum appellant became a general clerk in August 1974.

At the request of the Office, Dr. Homer A. Graham, a Board-certified orthopedic surgeon, examined the employee and reviewed the medical evidence of record. Dr. Graham reported on June 20, 1979 an impression of metastatic carcinoma to the spine but stated he had been unable to complete his evaluation and could not give a definite diagnosis.

An Office medical adviser reviewed the case record on August 1, 1979 and recommended referring appellant to an impartial specialist to resolve questions of causal relationship and disability. Prior to such a referral, the employing establishment submitted a June 21, 1979 report by Dr. Lewis Cozen, a Board-certified orthopedic surgeon, who performed a fitness-for-duty examination for the employing establishment. Dr. Cozen diagnosed lumbosacral and lumbar disc disease and opined the employee "cannot do work involving excess lifting of over 25 pounds, repeated bending, excess pushing or excess pulling because work like that would increase her pain but would not damage the structures of her back were she to do that type of work." On August 7, 1979 Dr. Henry G. Nixon, an employing establishment physician, recommended assigning the employee to permanent light duty with the restrictions set forth by Dr. Cozen.

By letter dated September 18, 1979 the Office referred the employee with a statement of accepted facts and the case file to Dr. Stanley S. Haft, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion concerning the causal relationship of the employee's back condition to factors of her employment and any resulting disability. Dr. Haft examined the employee on October 26, 1979 and concluded in a November 14, 1979 report that appellant had "extensive degenerative changes of the lumbar spine" which had been aggravated by her federal employment. Dr. Haft noted that the employee was performing "a lighter type of occupation" and stated she "would be limited to sedentary type of work where she could work predominantly in the sitting position at a bench, desk or table with minimal demands for physical effort, with some degree of walking and standing being permitted." Dr. Haft further concluded the employee had a permanent disability due in part to aggravation of her back condition by employment factors and that she was "limited from any activity of lifting, any activity including repetitive bending, stooping, lifting, pushing, pulling, climbing or other activities involving comparable physical effort."

By letter dated December 6, 1979 the Office informed appellant that it had accepted the employee had a "work-related aggravation of degenerative changes of the lumbar spine," and that it was requesting a supplemental opinion from Dr. Haft concerning whether the aggravation had caused disability for work. Dr. Haft opined in a December 31, 1979 report that employment factors had aggravated extensive degenerative changes of the lumbar spine and that the employee was capable of working 30 hours a week in a sedentary occupation. The Office medical adviser reviewed the case file and concurred with Dr. Haft that the employee was capable of working 30 hours a week at a sedentary job.

By compensation order dated February 25, 1980 the Office rejected "the claim for compensation for any period in excess of ten (10) hours per week after October 26, 1979" on the ground that the employee "is capable of working thirty (30) hours per week in limited duty, which is available at her employing establishment." In a January 23, 1980 memorandum attached to the compensation order the Office stated it would determine whether the employee was entitled to compensation prior to October 26, 1979 once it received an absence analysis from the employing establishment.

By letter dated March 4 and April 9, 1980 appellant, then the employee's representative, requested reconsideration of the February 25, 1980 compensation order. Appellant submitted a February 6, 1980 report by Dr. Small and a February 25, 1980 report by Dr. Horner in which Dr. Horner stated the employee "is considered to be totally disabled." By letter dated March 21, 1980 appellant requested a hearing in the employee's claim. The employing establishment submitted forms for the period December 4, 1976 to April 1980 which set forth the periods the employee worked and the annual and sick leave and leave without pay she used. Appellant thereupon requested the Office reconsider the case and begin payment of compensation based on 10 hours a week of wage loss as set forth in the compensation order.

By letter dated August 1, 1980 the Office stated it would pay the employee compensation beginning October 26, 1979 for a 25 percent loss of wage-earning capacity based on its determination that she could work 30 hours a week at her current job. The Office reiterated that it would also pay compensation for appropriate periods prior to October 26, 1979 when it received supporting medical evidence.

By decision dated September 9, 1980 the Office determined that the employee had a 25 percent loss of wage-earning capacity or a 75 percent wage-earning capacity on the ground that she qualified for the "position of clerk with the Post Office on a permanent part-time basis of 30 hours per week as medically certified." The decision stated the Office had considered the factors in 5 U.S.C. section 8115 for determining wage-earning capacity.

The employing establishment submitted a March 19, 1980 letter addressed to appellant in which it stated the employee had been placed on a 30 hour a week limited duty assignment performing sedentary work "in accordance with OWCP'S decision." In an October 31, 1980 letter the employing establishment stated appellant's duties consisted primarily of answering the telephone and doing some typing. It completed a form which indicated the duties could entail intermittent lifting of 50 to 75 pounds.

By letter dated December 1, 1980 appellant requested the Office compensate the employee for periods of wage loss prior to October 26, 1979 and submitted a September 15, 1980 letter by Dr. Rosenburg which states that the employee "has been undergoing further treatment for back problems during any periods she has been off work without pay." By letter dated January 12, 1981 the Office informed appellant that Dr. Rosenburg's letter was "too brief" to establish that all periods of wage loss were due to the employment-related aggravation of the employee's back condition and explained the type of evidence necessary for the employee to establish this aspect of the claim.

An Office medical adviser reviewed the case record on January 13, 1981 and stated that based on Dr. Haft's medical report the employee should be able to perform the duties of a general clerk for 30 hours a week with lifting restricted to non-repetitive lifting of 10 to 20 pounds. In response to an Office request to provide the lifting restrictions of the "light duty job . . . offered the claimant—the job she now works 20 hours a week, the employing establishment replied on April 6, 1981 that the employee's position of general clerk required her to lift from one-half ounce, the weight of a letter, to approximately 15 ounces, the weight of a telephone receiver, that her duties were secretarial and involved little or no lifting.

Appellant submitted the employee's treatment notes from Dr. Rosenburg for the period 1977 through 1979 and a June 16, 1981 report by Dr. Rosenburg. In the report Dr. Rosenburg stated the employee was "presently working 20 hours per week and finds that further activity causes increased pain."

By letter dated November 17, 1981 the Office stated that there was "little objective evidence" in Dr. Rosenburg's 1977 to 1979 treatment notes to establish that the employee's intermittent periods of disability were due to her employment-related back condition.

In response to an Office inquiry, the employing establishment stated in a February 2, 1982 letter that the employee had been working intermittently from two to four hours a day since her return to limited duty. It stated she had been on her current limited-duty assignment since March 27, 1980, but that medical reports indicated she had originally begun limited duty on March 18, 1979.

Appellant submitted an August 31, 1982 report by Dr. Rosenburg which outlined the employee's medical history and treatment back to 1958 and which concluded that "she is presently able to work between 10 and 20 hours a week but only with continual and persistent pain." Dr. Rosenburg also stated that the employee had developed renal insufficiency and uremia which he opined "is related in all probability to the use of medication taken for back pain . . . caused and/or aggravated by work."

The Office determined there was a conflict of medical opinion concerning the number of hours the employee was able to work and referred the employee with a statement of accepted facts and the case file to Dr. Phillip Harber, Board-certified in internal medicine and occupational medicine, for a multidisciplinary evaluation. Dr. Paul M. Tsou, a Board-certified orthopedic surgeon, examined the employee on July 14, 1983, stated she was working two to four hours a day up to three times a week, reviewed x-rays and diagnosed degenerative lumbar and cervical disc disease and uremia secondary to probable Phenacetin neuropathy. Dr. Tsou concluded the employee's work as a postal clerk "may have caused additional injury and sprain" to the lumbar spine, "but perhaps not to any significant degree." He concluded she was "severely impaired in her physical capabilities," and capable of only a "very light office type of work."

Dr. Robert A. Faguet, a Board-certified psychiatrist, evaluated the employee on July 14, 1983 and concluded she evidenced "histrionic personality features" not causally related to her employment which was a preexisting condition which "contributes to the slow resolution of her physical difficulties."

Dr. Harber examined the employee on August 17, 1983 and submitted a report of that date and an October 4, 1983 report summarizing his, Dr. Tsou's and Dr. Faguet's findings. In the latter report Dr. Harber concluded appellant's employment "would have likely produced temporary significant exacerbation of symptoms" which "may last up to several months after a particularly strenuous lift[ing] episode." Dr. Harber further concluded that "multiple repetitive stress, particularly on the substrate of chronic degenerative changes, may have produced permanent anatomic abnormalities." Dr. Harber also concluded that the evidence of record showed the employee had "renal abnormalities prior to initiating heavy dose analgesic therapy for her occupationally related back pain," but that it was "quite probable that her heavy analgesic use has contributed significantly to worsening of renal function." Drs. Tsou and Faguet concurred in Dr. Harber's October 4, 1983 report.

Dr. Harber submitted an October 17, 1983 work restriction evaluation form which stated the employee could work eight hours a day and could perform eight hours of intermittent sitting, walking or standing. He stated she should do no bending, squatting, climbing, kneeling or twisting. In his October 4, 1983 report Dr. Harber stated the employee could not carry more than five pounds at a time.

Dr. Ken A. Collinsworth, an Office medical consultant who is a Board-certified internist, reviewed the case record on November 1, 1983 and opined that the opinions and conclusions of Drs. Harber, Tsou and Faguet seemed justified based on the evidence of record.

In a December 2, 1983 letter addressed to the employee's health insurance company, the Office stated it has accepted the claim for "permanent aggravation of degenerative changes of the lumbar spine."

By letter dated December 2, 1983 the Office asked the employing establishment whether light work consistent with Dr. Harber's recommendations were available and if so, to offer it to the employee. The employing establishment submitted to the Office a "limited-duty authorization" it had sent to the employee asking her to accept or reject a limited-duty assignment for an indefinite period. An Office medical adviser reviewed the "limited-duty authorization" and concluded the limited duty was compatible with the employee's restrictions. By letter dated August 29, 1984 the Office informed appellant the limited-duty position was suitable and requested that the employee accept or reject the position. A reply was apparently not forthcoming.

By decision dated June 6, 1986 the Office denied modification of its February 25, 1980 decision on the ground that the weight of the medical evidence of record, represented by the reports of the impartial specialists, Drs. Harber, Tsou and Faguet, established the employee could work at least six hours a day.

Appellant, the executor of the employee's estate who is the employee's son, filed an appeal with the Board and requested oral argument. He asserts on appeal *inter alia* that the Office failed to consider the opinions of the employee's treating physicians and "failed to consider additional evidence, including the inability of applicant [employee] to perform any meaningful work, failed to consider her absences from work; [and] failed to afford her due process by delaying her application for eight years . . ."

The Director of the Office filed a motion to remand the case to the Office for further development. The Director noted that the employee had been receiving compensation for a 25 percent loss of wage-earning capacity effective October 26, 1979 based on her ability to work six hours a day in a sedentary job available at the employing establishment. The Director acknowledged, however, that the "Office's loss of wage-earning capacity decisions in this case did not contain any findings of reasonable availability, and were also improperly based on the employee's (capacity to earn wages) at a single light duty 30-hour per week position at the employing establishment." The Director stated that if the case were remanded the Office "will determine the actual hours per day the employee missed work for the period October 26, 1979 to the date of her death, and will pay appellant the difference between the appropriate compensation for the above period of intermittent disability and the loss of wage-earning capacity already paid." The Director also stated "the Office will also issue a final decision on the claim for alleged periods of disability prior to October 26, 1979."

Appellant filed a response in opposition to the motion asserting that "appellant has already been mortally prejudiced by the delay of the OWCP in this matter" and that remanding the case would further prejudice appellant's rights and deny due process. On September 14, 1987 the Board issued an order denying the motion to remand. An oral argument was held before the Board on January 25, 1988.

The Board finds that the case is not in posture for decision and should be remanded to the Office for further development.

As conceded by the Director in his motion to remand and at oral argument, the Office improperly determined that the employee had a 25 percent loss of wage-earning capacity effective October 26, 1979. Although the Office stated in its September 9, 1980 decision that it had considered the factors set forth in 5 U.S.C. section 8115 for determining wage-earning capacity, the record establishes that the Office failed to consider the reasonable availability of the selected position within the employee's commuting area and in the open labor market, factors the Office must consider when it bases its determination on an employee's "capacity to earn wages" rather than on actual earnings.[1] As the Director acknowledged on appeal the Office's decisions "were also improperly based on the employee's 'capacity to earn wages' at a single light-duty 30 hour per week position at the employing establishment."

The case record shows that following the employee's return to work after the November 14, 1978 employment injury, the employee was able to perform only part-time sedentary work, typically no more than 20 hours a week. On remand, the Office should calculate the employee's loss of wage-earning capacity effective October 26, 1979 based on any actual earnings from that date until the date she died.[2] The Office should determine the actual hours per day the employee was absent from work from October 26, 1979 to the date of her death and pay her estate the difference between the appropriate compensation for that period of intermittent disability and the loss of wage-earning capacity already paid.

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[1] *Sandra Foster*, 35 ECAB 183 (1983). *See also David Smith*, 34 ECAB 409 (1982).

[2] On remand, the Office in calculating the employee's loss of wage-earning capacity based on actual earnings should compare the earning capacity based on actual earnings on October 26, 1979 with the October 26, 1979 value of the job the employee held on November 14, 1978, the date of injury, and apply that percentage to the employee's monthly pay at the date of injury, November 14, 1978. *See Neal Olson*, Docket No. 86–137 (issued February 21, 1986); *Joseph H. Brunette*, 26 ECAB 121 (1974); *Francis X. Milesky*, 13 ECAB 128 (1961).

The Board notes that the Office has not yet issued a final decision concerning compensation for the period prior to October 26, 1979 and that this aspect of the case is therefore not before the Board.[3] Counsel for the Director reiterated at the oral argument that the Office would issue a final decision on this aspect of the case upon the return of the case record to the Office.

Appellant asserted at the oral argument that he had submitted several medical bills to the Office for the period 1980 to 1985 on which the Office had not issued decisions concerning reimbursement. Upon return of the case record to the Office, the Office should issue a decision on this aspect of the case.

Appellant also asserted at the oral argument that the Office should pay interest on any compensation benefits due the employee's estate. The Board has stated that payments under the Federal Employees' Compensation Act are in the nature of grants or gratuities and are limited to the amounts and circumstances specified in the Act.[4] The terms of the Act are specific concerning the method and amount of payment of compensation; neither the Office nor the Board has the authority to enlarge the terms of the Act nor to make an award of benefits under any terms other than those specified in the statute.

There is no provision in the Act for the payment of interest on awards of compensation. The Act contains no provision which either in specific terms or by way of implication authorizes the payment of interest when awards of compensation are made retroactively.[5] Therefore appellant's contention that the Office should pay interest has no merit.

The decision of the Office of Workers' Compensation Programs dated June 6, 1986 is hereby set aside. The case is remanded for further development consistent with this decision of the Board and for the issuance of a *de novo* decision as expeditiously as possible in view of the more than six-year delay between the March 1980 request for reconsideration of the February 25, 1980 decision and the June 6, 1986 denial of modification of that decision.

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[3] 20 C.F.R. section 501.2(c).

[4] *See Edith C. Alter*, 32 ECAB 995 (1981) and cases cited therein.

[5] *Edith C. Alter*, 32 ECAB 995 (1981).

In the Matter of LOUIS L. JACKSON, SR. *and* DEPARTMENT OF THE AIR FORCE, KELLY AIR FORCE BASE, TEX.

Docket No. 88-21; Submitted on the Record;
Issued January 29, 1988

Before MICHAEL J. WALSH, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether appellant is entitled to augmented compensation under section 8110 of the Federal Employees' Compensation Act because of a minor grandchild whom he has been supporting and of whom he has legal custody.

Appellant, a 56-year-old offset press operator, sustained injury to his cervical and lumbar spine, right arm and ribs on November 23, 1981 while lifting a mounting plate. On June 19, 1985 appellant sustained further injury when the vehicle he was riding at the employing establishment was struck by another car. Appellant's claims were accepted by the Office of Workers' Compensation Programs for a permanent aggravation of preexisting degenerative arthritis of the neck and shoulders.

On November 22, 1986 appellant filed a CA-7 form claiming compensation for the period December 15, 1986 through January 15, 1987. The record indicates that appellant retired from his federal employment effective December 15, 1986. On the claim form, appellant listed as a dependent a daughter by the name of Delores who was born on September 5, 1961.

By compensation order dated June 3, 1987 the Office accepted appellant's claim for total disability for the period commencing December 15, 1986. By letter dated July 13, 1987 the Office advised appellant that he would be in receipt of compensation benefits for the period January 16, 1987 through July 4, 1987 and would thereafter receive regular payment every four weeks commencing with the period July 5, 1987. Appellant was further advised that compensation would be paid at the basic rate of 66⅔ percent as he had no dependents.

By letter dated July 18, 1987 appellant claimed entitlement to the augmented rate of compensation provided by section 8110 of the Act for injured employees having dependents.[1] The dependent claimed by appellant is a minor grandchild born February 2, 1971. The record indicates that appellant is the guardian for his grandson and has legal custody. By telephone conversation dated August 12, 1987, an Office claims examiner noted that he informed appellant of the requirements for augmented compensation and that legal guardianship of the grandchild was not sufficient.

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[1] 5 U.S.C. section 8110.

By compensation order dated September 16, 1987 the Office rejected appellant's claim for augmented compensation on the ground that appellant had not adopted his grandson, and that a grandchild is not included in the term "child" as defined in the Act.

Section 8110 of the Act, entitled *Augmented Compensation for Dependents*, provides in pertinent part that the term "dependent" includes an unmarried child "while living with the employee or receiving regular contributions from the employee towards his support." [2] The term "child" is further defined in the Act's definition section at 8101(9), as follows:

> "Child means one who . . . is under 18 years of age or over that age and incapable of self-support, and includes stepchildren, adopted children, and posthumous children, but does not include married children." [3]

The Board finds that appellant's grandchild is not among the categories of persons included in the term "child" for purposes of the Federal Employees' Compensation Act.

The definition of the term "child" in section 8101(9) of the Act provides for three specific relationships in addition to the biological relation between a parent and his or her natural child. There are other close relationships between an adult and a child, such as that between a legal guardian and a ward which are not included.[4]

In *Aretha Hudson*,[5] the employee claimed entitlement or augmented compensation because of two minor nephews whom she supported and of whom she had legal custody. The Board found that while the employee was legal guardian of her nephews, she had not adopted the children and that a nephew was not included in the term "child" as defined by the Act.

Section 8110 of the Act defines the classes of persons who qualify as "dependents" and thereby come within the scope of the Act for purposes of augmented compensation. This section makes provision that only a member of the classes of children specifically defined as a "child" of the injured employee will entitle the latter to augmented compensation for dependents. Further, the Board notes that the term "grandchild" is separately defined under section 8101(10) of the Act and appears only in section 8133 of the Act which provides for those classes of persons as specifically defined who are eligible for death benefits.[6] In accordance with the principle of *expressio unis est exclusio alterius,* those persons or relationships not specified are not included.[7] The intention of Congress is clear from sections 8101(9), 8101(10), 8110 and 8133 that only a member of one of the classes of children specifically defined as a "child" under section 8110 would entitle an employee to augmented compensation for such dependent. While Congress allowed grandchildren as a class of persons eligible for death benefits under section 8133, Congress did not specifically define that class of persons as dependents for purposes of augmented compensation under section 8110. Therefore, appellant is not eligible for augmented compensation based on his guardianship of his grandchild.[8]

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[2] 5 U.S.C. section 8110(3).

[3] 5 U.S.C. section 8101(9).

[4] *Aretha Hudson*, 28 ECAB 169, 170 (1977).

[5] *Id.*

The September 16, 1987 decision of the Office of Workers' Compensation Programs is affirmed.

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[6] *See* 5 U.S.C. section 8101(10) and 8133(b).

[7] *Aretha Hudson*, 28 ECAB 169, 171 (1977); *Bennie Jones*, 37 ECAB 198 (1985). *See Sutherland. Statutory Construction* section 47.23 (4th ed. 1984).

[8] The Board notes that the Office has not issued a final decision with respect to a third party settlement obtained by appellant in relation to his injury on June 19, 1985 and it is not an issue on appeal before the Board. *See* 20 C.F.R. section 501.2(c).

In the Matter of WILBERT KIMBROUGH *and* U.S. POSTAL SERVICE, POST OFFICE, Olympia, Wash.

Docket No. 87-435; Submitted on the Record;
Issued January 29, 1988

Before MICHAEL J. WALSH, GEORGE E. RIVERS, WILLIE T.C. THOMAS

The issue is whether appellant's emotional condition constitutes an injury sustained in the performance of duty.

On June 7, 1985 appellant, then a 30-year-old distribution clerk, filed traumatic injury and occupational disease claims asserting he had experienced "severe stress" after "being charged with sexual harassment" in a May 7, 1985 meeting with his postmaster. Appellant stopped working on May 7, 1985, returned to work from May 14 through 16, 1985, and again stopped working until he returned to his usual work on July 22, 1985. He resigned on August 6, 1985.

In a May 24, 1985 statement appellant noted he had been employed with the postal service for six years and ten months and asserted the following:

> "The working conditions are very stressful, especially from loud noises from the cancelling machine and belt and everyone is told that production is down and we must work harder and work overtime sometimes four or five days a week, this goes on for eight to ten hours a day, five days a week. The final climax of stress came when I and two other employees were charged by the Postmaster of Olympia with sexual harassment, and told not to look, speak, stare, touch, pinch, etc., on or off the work floor and if so it can and will be used against you as further sexual harassment. I don't know how I can possibly do this when I must work around other employees and this would also be impossible when not working. From that moment on I could not work because of severe situational anxiety (stress). I did try for three days to work, but it was just too much for me with all the pressure and stress that is presently on me."

By letter dated June 13, 1985 the postmaster stated the following:

> "The alleged incident of May 7, 1985 was after I had been informed of the sexual harassment by female employees, and had conducted a preliminary investigation of the allegations. Mr. Kimbrough was informed by me of the alleged sexual harassment and further informed him of this possible willful misconduct."

The postmaster stated that the employing establishment controverted the claim "because of willful misconduct" and asserted appellant had failed to show that the severe stress was related to his assigned duties or arose out of his employment.

Appellant submitted a May 20, 1985 report by Dr. Gary A. Kelsberg, his personal physician who is a Board-certified family practitioner, which stated the following:

> "I first saw Mr. Kimbrough for this problem on May 9, [1985]. He stated that there has been continuous stress and difficulty

> with his employer, allegations of various sorts, that he has not been doing his job. This had been going over a two-week period. On the day that he came in, he stated that he had been accused of sexual harassment of a female employee at work. Apparently he and two male coworkers had been in a place off the job and had inadvertently witnessed this woman out with a man who was not her husband, and when they returned to work the following day she made allegations of sexual harassment against the three of them in an attempt to discredit their statements. In any case, in my office Mr. Kimbrough appeared to be very agitated and shaken. He was trembling. He appeared fatigued, somewhat unkempt and sweaty. At that time, I prescribed an antidepressant medication, Sinequan or Dixipine in increasing doses up to 75 mgs. a day. I recommended that he engage an attorney and the union arbitrator to work with him. I also referred him to our Mental Health Department for counseling.
>
> "* * * My feeling is that he had severe situational anxiety and until this job dispute is settled, I doubt that he will be able to perform his job adequately."

Dr. Nick Uraga, who specializes in emergency and aerospace medicine, performed a fitness-for-duty evaluation of appellant on June 6, 1985 and of the above-mentioned two coworkers for the employing establishment. Dr. Uraga noted the history of the May 7, 1985 meeting and appellant's statements that since then he was having symptoms of tremulousness, difficulty in concentrating and sleeping, decreased appetite and libido, nausea, constipation, irritability and weight loss. Dr. Uraga concluded as follows in a June 7, 1985 report:

> "This individual relates symptoms and a past history suggestive of what I would describe as an agitated depression and/or an anxiety reaction of an exogenous etiology. However, the individual during my evaluation of him did not display any clinical signs consistent with the diagnosis. Due to the unusual nature of this situation, I have referred the individual for a psychiatric evaluation to Dr. Ang."

Dr. Uraga also submitted a June 7, 1985 cover letter accompanying his individual evaluations of appellant and the two coworkers against whom complaints of sexual harassment had been made. Dr. Uraga stated as follows:

"After interviewing the above-mentioned individuals, I cannot help but note certain items which I find as peculiar. First of all, all three individuals have essentially the same symptoms which I would classify as agitated depression. All three individuals relate a similar reason for their symptoms, which involves a confrontation with their supervisor in regards to a common event. The stories related by each individual concerning the confrontation are consistent, but, impressive in the fact that there aren't the slightest, minimal inconsistencies in their stories, and their phraseology and description of events is essentially identical and script-like. Likewise, in describing their symptoms of stress, the symptoms are all identical and the same phraseology is used. Furthermore, when I asked what worries or concerns could be causing their symptoms of stress, each individual answered the cause was their job and vocalized a concern that they would not be able to control their emotions should they return to work. Possible violent behavior and worsening of their present symptoms of stress were given as answers. I find it unusual that not one of these three individuals mentioned a possible termination of employment and resultant financial dilemma nor disaffection of a spouse. According to the reports by these individuals, I would have imagined the confrontation with their supervisor should have elicited such concerns and, however, none of the individuals mentioned any such considerations.

"During my interview of . . . [one coworker], it was mentioned that these three individuals are more than casual workplace acquaintances and are linked by a bond of comraderie and friendship. [The coworker] . . . relates that since the encounter with the supervisor, the three individuals have been in contact with each other and he has received advice as to seek out psychiatric treatment and obtain a work excuse based upon job-related stress.

"When I had asked these three individuals if they had ever experienced any psychiatric or emotional problems in the past, they categorically denied any such past history. I further inquired as to whether they had experienced stressful situations in the past, and questioned them as to how they handled such crisis. The individuals denied ever having been placed in stressful or emotionally upsetting situations. In two cases, I found this reply to be unexpected. One individual related he was a veteran who had served in Viet Nam, the other individual [appellant] related he had been in the Navy and had left

> his family for extended sea cruises lasting six to eight months, and this individual also related that during this active service, his wife had been seriously ill.
>
> "In evaluating two individuals (Mr. Kimbrough and . . . [a coworker]) the symptoms reported by the individual did not coincide with my abettedly limited evaluation of their affect and behavior. * * *"

Appellant submitted a June 25, 1985 report on a form of the Office of Workers' Compensation Programs by Dr. Manfred K. Joeres, a psychiatrist, which reported findings of "Paranoid ideation. Impaired reality testing around work-conflict. Excess anxiety."

By letter dated June 28, 1985 the Office informed appellant of his responsibility to provide a detailed chronological statement describing the stressful circumstances to which he related his emotional condition. The Office also noted that the history given by Dr. Kelsberg in his May 20, 1985 report of job stress and difficulties over a two week period prior to May 7, 1985 was a variance with the brief history provided by appellant to the Office and requested a supplemental opinion from Dr. Kelsberg.

Appellant thereupon submitted July 10 and 26, 1985 reports by Dr. Kelsberg. Dr. Kelsberg stated the following in the latter report:

> "In my opinion, it is very difficult to sort out exactly what has transpired with Mr. Kimbrough and this episode, having to rely on Mr. Kimbrough's information exclusively. When he talks, there is a certain paranoid flavor to his conversation, but I am not privy to the records of his psychiatrist."

Dr. Jessy Ang, a Board-certified psychiatrist, performed a fitness-for-duty evaluation of appellant for the employing establishment and in July 5, 1985 report stated appellant gave a history of being called in by his postmaster on May 7, 1985 who angrily accused him of sexual harassment of female employees. Dr. Ang further reported the following:

> "Clinical Impression: Adjustment disorder with mixed emotional features.
>
> "Treatment and Recommendations: From the patient's narration of his symptoms, he appears to have developed acute situational stress reaction secondary to May 7, 1985 incident. However, I find it improbable that the symptoms he's experiencing are just a consequence of the incident. His symptoms

> are not within the normal response to this kind of encounter unless there's truth to the complaints and the resulting guilt and fear of possible consequences such as loss of job or marital discord. The resulting condition is not at all related to the nature of his employment. The immediate request for sick leave, the compelling desire to receive psychiatric treatment which is highly unusual for blue collar workers, the apparent similarity of their [appellant's and two coworkers'] complaints, the immediate hiring of legal counsel prior to meeting with the Postmaster, the definite discrepancies about their denial of the Postmaster's encounter with these individuals just clearly states that their complaints need to be viewed with skepticism.".

In a July 15, 1985 report Dr. Uraga stated he concurred with Dr. Ang and that medically he found "the similarity in symptoms and courses of action taken by these three individuals to be beyond the realm of pure chance." In a July 31, 1985 report Dr. Uraga stated he "found no medical indication for absence from work" when he evaluated appellant on June 6, 1985 because appellant's behavior in his office "was in distinct contraindication to his alleged symptoms" of severe stress.

Appellant's attorney submitted a July 24, 1985 letter which set forth appellant's assertions that two events preceded the May 7, 1985 incident at work. The attorney stated that on or about April 17, 1985 appellant questioned a female coworker concerning rumors and lies she was allegedly spreading about him, that the coworker then "made such a scene" that both of them were called into their supervisor's office. The attorney also stated that on or about May 3, 1985 appellant and two coworkers had breakfast at a restaurant after their work shift and afterwards while sitting in the vehicle of one of the coworkers at approximately 3:00 a.m. observed a female coworker drive into the parking lot with a man other than her husband and appeared to try and slump down in the seat. The attorney further stated that on the evening of May 3, 1985 appellant became aware of rumors at work he believed were started by the female coworker that appellant and his two coworkers had followed her and was harassing her. The attorney stated that appellant was allegedly advised by other coworkers that certain female coworkers had stated they were going to have appellant and his coworkers fired, and that because of the May 3, 1985 events appellant and his coworkers consulted an attorney on May 6, 1985 concerning legal steps to stop the rumors. Appellant's attorney then set forth appellant's recollection of the May 7, 1985 meeting with the postmaster, reiterating the contentions in appellant's May 24, 1985 statement.

In a September 16, 1985 letter the postmaster stated that when he met with appellant and the two coworkers individually on May 7, 1985 he did not "charge" them with sexual harassment, but stated that "complaints" of sexual harassment had been filed against them. He submitted his memorandum of the May 7, 1985 meetings and a May 8, 1985 letter from appellant's attorney in which the attorney stated the following:

> "The employees' most immediate concern was their understanding of your directions to them that they refrain from any contact, including looking at, talking to, touching, etc., with any female employees of the Post Office during or off working hours. As you can imagine, this would make it essentially impossible for them to function in their positions with the Post Office. You have clarified that your directions to the employees on May 7, 1985, were only that they refrain from *nonbusiness* discussion or contact with female employees of the Post Office during the investigation, which you indicated would commence on May 8 at approximately 3:30 p.m. I indicated that I would advise the employees of the more limited extent of your direction than as they previously understood it and related it to me."

Appellant and his two coworkers had signed the bottom of the letter in addition to the attorney.

The case record includes a July 30, 1985 memorandum from the postmaster which states that on May 6, 1985 six female employees asked to meet with him and presented complaints alleging sexual harassment by appellant and his two coworkers. The postmaster recounted the events of his May 7 meetings with appellant and two coworkers and stated he advised appellant there would be an immediate investigation. The postmaster described the investigation that was undertaken and stated he had concluded upon its completion that "there was insufficient factual evidence to warrant charges of sexual harassment being filed against the three males." The postmaster stated he advised the complainants, appellant and the two coworkers of this and that he told appellant and his two coworkers "that I felt their conduct with some female employees in this post office was totally inappropriate and that I would not tolerate similar behavior from that point on." Another employing establishment official concurred with this conclusion in an October 3, 1985 report and stated that appellant's "conduct . . . was not acceptable as to what is expected of all employees." He noted that appellant had not "suffered any disciplinary actions or other penalties imposed by management for their conduct."

By letter dated January 8, 1986 the Office requested the employing establishment to submit a copy of the investigative report.[1] The report stated that the incident that prompted the May 7, 1985 meeting occurred a few days earlier when appellant and his two coworkers supposedly followed a female coworker to a restaurant and subsequently made remarks to her while at work and to her father, another coworker. The investigator stated that "numerous individuals were interviewed and provided statements to support the allegations submitted by the complainant."

By decision dated March 26, 1986 the Office rejected the claim on the ground that "disability beginning May 7, 1985 was not due to any injury sustained while in the performance of duty." The Office found that the "medical evidence shows his condition is due to an emotional reaction to being warned and told he is under investigation for sexual harassment," and that these "circumstances do not constitute an injury within the meaning of the Act."

At appellant's request a hearing was held before an Office hearing representative on July 24, 1986 at which appellant testified. He asserted that his emotional condition arose out of the duties he was assigned to perform "based on those restrictions . . . imposed on me, that I couldn't function under conditions like that. I couldn't look at anybody, couldn't speak to anybody." Appellant further asserted that the sexual harassment complaints lodged against him related to his federal duties because "it occurred during the job; that it was on the clock, when I was called in to the postmaster's office." One of appellant's coworkers against whom the sexual harassment complaint had been filed also testified at the hearing. The employing establishment reviewed the hearing transcript and submitted its comments.

By decision dated and finalized October 29, 1986 the Office hearing representative determined that appellant's emotional condition was not due to an injury sustained in the performance of duty. The hearing representative concluded that the "circumstances cited by the claimant all relate to actions taken toward him by the employing agency, but with such actions bearing no relationship to the claimant's regular or specifically assigned work duties, or to requirements imposed by the federal employment itself."

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[1] It is not clear whether the case record contains the complete investigative report.

Appellant filed an appeal with the Board. The Director filed a memorandum in support of his decision asserting that the actions by the employing establishment taken in response to the allegations of sexual harassment against appellant do not constitute factors of employment because the activities engaged in by appellant which ultimately led to the accusations of sexual harassment were unrelated to appellant's regular or specifically assigned duties or to a requirement imposed by his employment.

Appellant's attorney replied to the memorandum that "the unusual restrictions that the appellant not look at, speak to or be around any female postal employee on or off the job, and given the nature of the appellant's job, made it impossible for him to work and caused him emotional distress." He contended that therefore the emotional condition was "directly attributable to the specifically assigned working restriction or requirement imposed by his employer."

The Board finds that appellant's emotional condition does not constitute an injury sustained in the performance of duty.

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employees' employment. There are situations when an injury or illness has some connection with the employment but nevertheless does not come within the coverage of workers' compensation.[2] When the disability results from an employee's emotional reaction to his day-to-day regular duties, to specifically assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act.[3]

In the present case, appellant alleged and there was some support in the medical evidence that his emotional condition was due to being informed by his postmaster of complaints of sexual harassment against him and of an investigation which would be conducted and due to restrictions imposed by the postmaster described by appellant as including not looking at, speaking to or being around any female employees on or off the job.[4] The sexual harassment complaints and the investigation of same did not arise out of appellant's day-to-day regular duties, any specially assigned duties or from a requirement imposed by the employment.[5] Rather, the complaints and investigation arose out appellant's own behavior toward certain female coworkers, behavior described by the employing establishment as "totally inappropriate."

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[2] *Manuel W. Vetti*, 33 ECAB 750 (1982).

[3] *Manuel W. Vetti*, *supra; Pauline Phillips*, 36 ECAB 377 (1984).

[4] Although appellant initially implicated "stressful" working conditions such as loud noise and overtime, he subsequently focused only on actions relating to the sexual harassment complaint.

[5] *See Helen Marotte*, 36 ECAB 670 (1985).

Concerning allegations that the emotional reaction was to "severe" restrictions placed on appellant by the postmaster, the Board notes appellant's attorney's May 8, 1985 letter signed by appellant shows that appellant was aware that the restrictions involved only nonbusiness discussion or contact with female coworkers during the investigation. In any case, the restrictions placed on appellant by the postmaster did not arise out of any requirement necessitated by appellant's employment per se, but out of his own behavior. The reaction to such restrictions, therefore, does not constitute an injury in the performance of duty.

The decisions of the Office of Workers' Compensation Programs dated March 26, 1986 and dated and finalized October 29, 1986 are hereby affirmed.

In the Matter of LINDSAY A.C. MOULTON, claiming as widow of DR. DAVID G. MOULTON, Ph.D. *and* VETERANS ADMINISTRATION, VETERANS ADMINISTRATION HOSPITAL, Philadelphia, Pa.

Docket No. 86-2129; Hearing, August 12, 1987;
Issued January 29, 1988

Appearances: *Robert Boute, Esq.*, for appellant; *Luann B. Kressley, Esq.*, for the Director, Office of Workers' Compensation Programs.

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether the employee's death occurred in the performance of duty.

On September 21, 1983 appellant filed for death benefits, claiming as the widow of the employee, a research physiologist, who died on January 25, 1981. Appellant indicated that the employee died while attending the Fourteenth Annual Winter Conference on Brain Research at Keystone, Colorado where he was to present the results of research work performed at the employing establishment.

Appellant submitted a December 28, 1983 report from Dr. Marvin L. Silverblatt, a Board-certified internist of professorial rank specializing in cardiology. Dr. Silverblatt stated that the employee, then a 52-year-old biochemist, collapsed due to cardiac arrest while skiing on January 25, 1981 and died. He reported that the employee had essential hypertension, elevated cholesterol and triglycerides, and was markedly overweight. He concluded that the high altitude the employee was exposed to coupled with physical exertion precipitated a massive myocardial infarction.

The Office of Workers' Compensation Programs requested further information from appellant and the employing establishment. In an October 9, 1984 report, Dr. Mark D. Bracker, a Board-certified family practitioner, stated that the direct cause of death was probably a myocardial infarction. The doctor indicated that exercise at high altitude was probably a contributory cause of death.

The Office received a copy of the employee's December 31, 1980 request for a leave of absence to attend the Winter Brain Research Conference where he had been invited to present a paper on research performed at the employing establishment. In a January 6, 1981 memorandum, the employee's superiors authorized administrative leave, noting that there would be no expenses paid other than his salary. The employing establishment pointed out that as the employee was on authorized absence, travel orders were not issued. The employing establishment submitted records of the employee's prior requests for leave to attend conferences and authorizations of leave.

The employing establishment also submitted to the Office the employee's 1980 performance appraisal. The responsibilities included scientific community contributions such as publishing papers in journals and making oral and written presentations of research results, conclusions or advances in the employee's field.

In a February 4, 1985 letter, the Office informed appellant that it had not resolved whether the employee was in the performance of duty at the time of his death. It stated that although the employee was granted administrative leave to attend the conference there were no other factors which would bring attendance at the conference within the employee's performance of duty. It noted that the conference was sponsored by a private research organization and the employing establishment did not authorize reimbursement for travel expenses. The Office requested further information concerning the conference, including a copy of the agenda and further information from the employing establishment concerning its policy on authorizing leave. It also requested comment on the nature of the employee's attendance at the conference and the benefit the employing establishment expected to gain from the employee's attendance at the conference.

In response, the employing establishment reported that absence was authorized without charge to leave or loss of pay; that records regarding the exact nature of the employee's presentation at the conference were unavailable; and that when employees were granted administrative leave to attend a conference it was assumed that they would acquire advanced technological knowledge which would be of a tangible benefit to the employing establishment.

In a February 15, 1985 letter, Dr. Pierre M. Dreyfuss, the chairman of the conference, stated that the employee was to be a participant in a workshop on the interactions between behavioral states and sensory perception on January 29, 1981. He stated that participation in the conference was a professorial activity and furthered the education of participants. A copy of the agenda revealed that the employee had been invited to discuss the relationship between gonadal steroid levels and performance of rats in odor detection tasks based on research performed at the employing establishment.

In a June 3, 1985 decision the Office denied appellant's claim on the ground that the evidence of record failed to establish that the employee was in the performance of duty at the time of his death.

Appellant requested a hearing before an Office hearing representative. At the April 16, 1986 hearing, Dr. Richard Doty, a colleague of the employee, testified that participation at the conference would be important for several reasons: participants maintained contacts with other scientists and learned about new ideas, new technology or new approaches to problems; as head of a laboratory, the employee would have been able to seek information concerning post-doctoral students and graduate students he might recruit to work in his laboratory; that the employee would have met informally with scientists who would be part of peer review committees that would review the employee's requests for research grants to provide funding for his laboratory's operation; and that the informal recreational parts of the conference gave participants an opportunity to interact with others. Dr. Doty testified that he had attended the conference at which the employee died; that skiing provided participants an opportunity to talk to each other; and that lack of participation in all phases of the conference, including recreational activities, would be viewed by some participants as inappropriate.

Appellant testified that she had attended conferences with the employee on several occasions and that participants were expected to take part in recreational activities.

Appellant submitted at the hearing statements from Dr. Dreyfuss and Dr. Bernice M. Wenzel, chairpersons of the conference. The chairpersons stated that the informal and recreational activities provided for participants were an important part of the conference because the activities provided an opportunity for participants to exchange information, arrange possible collaborations and discuss theories, speculations and ideas.

In a June 11, 1986 decision, the Office hearing representative found that although the employee's attendance at the conference was an incident of his employment, the skiing which allegedly caused his death was not reasonably incidental to the employee's employment. He therefore concluded that the employee's death was not within the performance of duty.

The Board finds that the employee's death did not occur within the performance of duty.

Under the Federal Employees' Compensation Act an employee on travel status or on a special mission is in the performance of duty 24 hours a day when he is engaged in activities essential or incidental to his special duties.[1] Examples of such activities are eating,[2] returning to a hotel after eating dinner [3] and engaging in reasonable activities within a short distance of the hotel where the employee is staying.[4] However, when a claimant voluntarily deviates from such activities and engages in matters, personal or otherwise, which are not incidental to the duties of his temporary assignment, he ceases to be under the protection of the Act. Any injury occurring during these deviations is not compensable.[5] Examples of such deviations are visits to relatives or friends while in official travel status,[6] visiting nightclubs and bars,[7] skiing at a location 60 miles from where an employee is undergoing training [8] and taking a boat trip during nonworking hours to view a private construction site.[9]

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[1] *William K. O'Connor*, 4 ECAB 21 (1950).

[2] *Carmen Sharp*, 5 ECAB 13 (1952); *Michael J. Koll, Jr.*, 37 ECAB 340 (1986).

[3] *William K. O'Connor, supra.*

[4] *Theresa B. L. Grissom*, 18 ECAB 193 (1966).

[5] *Karl Kuykendall*, 31 ECAB 163 (1979).

[6] *George W. Stark*, 7 ECAB 275 (1954); *Miss Leo Ingram*, 9 ECAB 796 (1958); *Ethyl L. Evans*, 17 ECAB 346 (1966).

[7] *Conchita A. Elefano*, 15 ECAB 373 (1964).

[8] *Karl Kuykendall, supra.*

[9] *Mattie A. Watson*, 31 ECAB 183 (1979).

The employee's attendance at the conference was within the performance of duty. When attending a convention, conference or professional meeting, compensability turns on whether a claimant's contract of employment contemplated such attendance as an incident of his work.[10] In this case, the employee's performance requirements included presentation of papers and oral presentations of his research results. The employee was attending the Winter Brain Conference in question to give an oral presentation of results of his research. His attendance at the conference meets the requirement of being an incident of his employment. Therefore, the employee was within the performance of duty while attending the conference.

The above finding, however, does not establish that the recreational activity (skiing) which the employee was engaged in that precipitated his fatal myocardial infarction was within the performance of duty. The Board has held in several occasions that an employee on travel status or a special mission who was injured while engaging in recreational activities did not sustain an injury in the performance of duty. In *Garrett M. Levie*,[11] appellant was assigned temporary duty in Pittsburgh when he and four coworkers departed after work for a personal pleasure trip to New York City. Appellant was injured in an automobile accident en route. The Board held that appellant's purpose in the trip was purely personal and recreational and therefore his injury was not sustained in the performance of duty. In *Conchita A. Elfano (Domingo Elfano)*,[12] the deceased employee was on a temporary assignment to the Subic Bay Naval Base when he and a companion left the base one night to go to a nightclub. He remained at the club until 4:00 a.m. and then took a taixcab to go back to the base. The employee was fatally shot when a fellow passenger became involved in an argument with the driver, pulled out a pistol and fired at the driver. The Board found that the employee's activities were not reasonably incidental to his employment and therefore his death was not in the performance of duty. In *Karl Kuykendall*,[13] appellant was on temporary duty for training in Denver, Colorado when after his regular scheduled duty hours he fell from a ski lift at a ski resort approximately 60 miles from Denver. The Board found that the employee had deviated from activities reasonably incidental to his temporary duty assignment to engage in recreational activities and therefore did not sustain an injury within the performance of duty. In *Mattie A. Watson (William W. Watson)*,[14] a deceased employee on temporary duty at Pearl Harbor chartered a boat on a Sunday and was taking a trip to look at a private construction site when the boat capsized and the employee drowned. The Board found that the boat trip was not related to activities incidental to the employee's temporary duty assignment but was rather a personal and recreational activity not covered under the Act and that his death did not occur in the performance of duty.

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[10] Larson, *The Law of Workmen's Compensation*, section 27.31(c).

[11] 6 ECAB 94 (1953).

[12] *Supra*, footnote 7.

[13] *Supra*, footnote 5.

In the above-mentioned cases, the activities of the employee usually took place at a time and at a distance removed from where the employee would have been expected to be in the course of his travel or special mission on behalf of the employing establishment. In this case, the employee was at the Winter Brain Research Conference site where he was expected to be when he died in the course of skiing. The fact that the recreational activity occurred at the site of the conference, is not by itself sufficient to show that the employee was in the performance of duty when he died while skiing. It must also be shown that the recreational activity itself was reasonably incidental to the duties the employee was required to perform while in a travel status or on a special mission.

Recreational activities fall within an employee's performance of duty only in certain specific circumstances. The general criteria for performance of duty as it relates to recreational and social activities is set forth in *Larson* as follows:

> "Recreational or social activities are within the course of employment when (1) They occur on the premises during a lunch or recreational period as regular incident of the employment; or (2) The employer, by expressly or impliedly requiring participation, or by making the activity within the orbit of the employment; or (3) The employer derives substantial direct benefits from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life." [15]

Larson states that the outcome of these recreation cases turns on the "different "mix' in the fact situation."

In this case, the skiing that the employee engaged in was not a regular incident of his employment. Participation in the skiing has not been shown to have been expressly or impliedly required by his employer or to have been made within the orbit of the employee's employment by the employer. The allegation by appellant that conference participants were "expected" to take part in recreational activities is not sufficient to establish that the employee was required to ski on January 25, 1981 while attending the conference. Appellant has attempted to show that the employing establishment derived a direct benefit from the employee's participation in skiing by advancing the argument that the employee could seek information on studies, could recruit for the employing establishment, and could meet with colleagues who would participate in peer review committees that would review the employee's requests for research grants to fund his laboratory's operation. The evidence submitted by appellant consisted of statements from a colleague of the employee and the chairpersons of the conference on the benefits that conference participants in general derived from social and recreational activities at the conference. There is no evidence that the employee specifically engaged in the recreational activities with the goal of seeking new scientific information relevant to his research, seeking new employees for his laboratory or seeking funding for his research. There is no evidence that shows that the employing establishment derived a substantial direct benefit from the employee's recreational skiing at the conference.

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[14] *Supra*, footnote 9.

[15] *Larson*, section 22.00

The evidence establishes, however, that the employee's skiing was a personal, recreational activity available at the site of the conference he was attending. The skiing was not reasonably incidental to the purpose of the employee's travel, that is, to present a paper on research he had performed. The evidence of record therefore fails to establish that the recreational activity the employee engaged in which caused his fatal myocardial infarction meets the criteria of being within the performance of duty.

The decisions of the Office of Workers' Compensation Programs, dated June 11, 1986 and June 3, 1985 are hereby affirmed.

In the Matter of ROGER SEAY *and* TENNESSEE VALLEY AUTHORITY, PHIPPS BEND NUCLEAR PLANT, Chattanooga, Tenn.

Docket No. 87-1485; Submitted on the Record;
Issued January 29, 1988

Before GEORGE E. RIVERS, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issues are: (1) whether appellant forfeited his right to compensation for the period August 16, 1981 through August 15, 1982; (2) whether the Office of Workers' Compensation Programs properly determined that appellant was not "without fault" in the creation of the $9,512.44 overpayment, and that therefore the overpayment was not subject to waiver; and (3) whether the Office properly required 100 percent of appellant's continuing compensation withheld, until the $9,512.44 overpayment was recovered.

On July 8, 1980 appellant, then a 31-year-old construction laborer, filed a claim for compensation alleging that he injured his left hip and back on June 10, 1980 when "[he] was pulling [his] stakes to change [his] grade on pipes." Appellant stopped work on July 7, 1980 and returned to work on July 21, 1980. Appellant stopped work again on December 19, 1980 and has not returned.

On May 27, 1981 the Office of Workers' Compensation Programs accepted appellant's claim for low back strain and a ruptured L5 disc. Appellant received continuation of pay for the periods July 7, 1980 through July 20, 1980 and December 19, 1980 through January 16, 1981. Commencing January 17, 1981 appellant began receiving compensation payments for temporary total disability. In a series of claims for continuing compensation, submitted on form CA-8, including claims dated September 15, 1981, October 15 and 30, 1981 and November 15 and 30, 1981 appellant left blank the portion requesting information on employment. On a CA-8 dated September 30, 1981 appellant stated that he was totally disabled and had not worked during the period September 15 through September 30, 1981.

By letter CA-1049 dated January 21, 1982 the Office informed appellant that as of December 18, 1981 he had been placed on the periodic rolls. The Office instructed appellant that he needed to notify the Office immediately when he returned to work and that any compensation checks received after he returned to work must be returned to the Office. On January 26, 1982 appellant signed a copy of the letter, stating that he understood the conditions under which he received compensation.

By letter decision dated May 4, 1982 the Office determined that appellant was able to perform the work of general clerk and it reduced his compensation payments as of May 20, 1982 to reflect his wage-earning capacity.

By letter dated May 10, 1982 appellant requested a hearing before an Office hearing representative.

On August 15, 1982 appellant signed and submitted to the Office a form CA-1032 covering the previous twelve month period, without reporting any employment activities. The CA-1032 states in relevant part: "Any information left blank on the form has been done intentionally and indicates an answer by me that I have no information to provide which is required by the question."

A hearing was held on January 26, 1983, at which time appellant stated that he had looked for a job, but was not physically able to perform the kinds of labor jobs for which he was applying.

By decision dated August 25, 1983, finalized August 26, 1983, the hearing representative found that the medical evidence established that appellant was physically able to perform the duties of general clerk, and that the position accurately reflected appellant's capacity to earn wages. The May 4, 1982 decision reducing appellant's compensation benefits effective May 20, 1982 was affirmed.

On September 19, 1983 appellant's employing establishment informed the Office that appellant had been employed during the period July to October 1981. The Office referred the case to the Office of Inspector General and in an investigative memorandum dated January 13, 1986 the Office of Inspector General found that appellant was employed as a truck driver during the period September 19, 1981 through November 20, 1981, and that he had earned $1,765.15 as a result of that employment. The memorandum further stated that on January 7, 1986 appellant pleaded guilty to a one count Information before the United States Court of the Eastern District of Tennessee for making a false statement to obtain disability payments from the Office. Appellant was placed on one-year probation and ordered to make restitution in the amount of $842.00.

By compensation order dated July 16, 1986 the Office found that appellant had forfeited his right to compensation during the period August 16, 1981 through August 15, 1982 by failing to report his earnings in accordance with 5 U.S.C. 8106. The Office noted that section 8106 of the Federal Employees' Compensation Act provides that an employee who knowingly omits or understates any part of his earnings, forfeits his right to compensation with respect to any period for which the affidavit or report was required. Appellant had completed form CA-1034 on August 15, 1982 showing no earnings for the previous 12-month period. The record, however, showed that appellant had made some earnings during that 12-month period, and therefore he forfeited his right to compensation for that entire period. The Office concluded that all compensation paid during the period of forfeiture be declared an overpayment subject to recovery in accordance with 5 U.S.C. 8129.

By letter decision dated July 31, 1986 the Office made a preliminary determination that there had been an overpayment of compensation in the amount of $9,512.44. The Office referred to the compensation order dated July 16, 1986 to explain the rationale for its decision.

By letter dated July 30, 1986 appellant requested a hearing before an Office hearing representative. A hearing was held on April 9, 1987. At the hearing appellant testified in his own behalf claiming that he had notified his employing establishment approximately one month before he began work as a truck driver, that he was going to accept the employment. Appellant alleged that he assumed that his employing establishment would then notify the Office. Appellant admitted that he did not state on the August 15, 1982 Form CA-1032 that he had worked during the preceding 12 month period because he assumed once he had provided the information there was no need for him to repeat it. After the hearing appellant submitted a CA-8 form which was dated September 25, 1981 on which is stated: "[Appellant] has found work. He will work for Truck Train Inc." The claim form was signed by appellant. The record contains no record of this form CA-8, until appellant submitted the form to the hearing representative on April 20, 1987.

On May 7, 1987 the hearing representative contacted appellant's employing establishment, but they had no record in their files that the form in question had been submitted. They stated that they would have copies in their records of any material submitted by appellant.

By decision dated June 3, 1987, finalized that same day, the Office hearing representative found that appellant had knowingly omitted part of his earnings and therefore forfeited his right to all compensation paid for the period covered by the form CA-1032, which amounted to $9,512.44. Since the compensation was declared forfeit, an overpayment existed in the amount of $9,512.44. Since appellant had already made restitution in the amount of $842.00, the outstanding overpayment owed by appellant equalled $8,670.44. The hearing representative ordered 100% withholding of appellant's continuing compensation payments until the amount of the overpayment was recovered.

On June 19, 1987 appellant filed an appeal before this Board. On November 2, 1987 the Director of Office of Workers' Compensation Programs filed a Motion to Affirm in Part and Remand in Part. The Director supported the June 3, 1987 decision with respect to the forefeiture and overpayment issues, but acknowledged that the Office improperly withheld 100 percent of appellant's continuing compensation payments to recover the balance of the $9,512.44 overpayment. On December 8, 1987 appellant filed a Reply to Motion to Affirm in Part and Remand in Part. Appellant reiterated his position that he had informed the office of his employment in the CA-8 form dated September 25, 1981 and that he unintentionally omitted this information from the form CA-1032. Appellant also argued that he plead guilty in the United States District Court with an understanding that there was communication between the United States District Attorney and the Department of Labor which determined restitution. He stated that it was unfair for him to pay more than the $842.00 he already paid in restitution. Appellant agreed that the Office improperly withheld 100% of his continuing compensation payments.

The Board finds that appellant forfeited his right to compensation for the period August 16, 1981 through August 15, 1982 under section 8106(b)(2) of the Act.

Section 8106(b)(2) states:

> "The Secretary of Labor may require a partially disabled employee to report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times the Secretary specifies. The employee shall include in the affidavit or report the value of housing, board, lodging, and other advantages which are part of his earnings in employment or self-employment and which can be estimated in money. An employee who—
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> (1) fails to make an affidavit or report when required; or
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> (2) knowingly omits or understates any part of his earnings; forfeits his right to compensation with respect to any period for which the affidavit or report was required. Compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation payable to the em-

> ployee or otherwise recovered under section 8129 of this title, unless recovery is waived under that section."

In the present case appellant was employed as a truck driver during the period September 19, 1981 through November 20, 1981, and he earned $1,765.15 as a result of that employment. When appellant completed the form CA-1032 on August 15, 1982, which required him to report any earnings or employment during the previous 12 month period, he failed to report the $1,765.15 he earned as a truck driver. While appellant alleges that he notified the Office on a September 25, 1981 CA-8 form of his intent to work as a truck driver, this argument has little merit. First, the record is unclear as to whether appellant actually submitted the CA-8 form to his employing establishment. The employing establishment has no record of the form in question. However, even assuming that appellant submitted the September 25, 1981 CA-8 form, the forfeiture provision of the Act still applies. Section 8106 clearly states that the Office may require appellant to report his earning *in the manner and at the times the Secretary specifies*. The form CA-1032 requires an employee to report all earnings for the prior 12 month period. Appellant completed the form on August 15, 1982 and failed to report his earnings as a truck driver. In addition, the CA-8 dated September 30, 1981, which contrary to the CA-1032, was timely filed, clearly states that appellant was totally disabled and unable to work during the period September 15 through September 30, 1981. He failed to report his earnings in the manner and at the time specified by the Office. Therefore appellant forfeited his right to all temporary total compensation benefits he received for the 12 month period covered by the CA-1032, $9,512.44.[1]

Appellant alleges that he plead guilty in federal court on the understanding that the restitution ordered in the amount of $842.00 would settle this matter administratively as well as criminally. However, the Board has previously recognized that criminal and administrative proceedings involving 5 U.S.C. section 8106(c)(2) on the same facts are separate and distinct matters.[2] The Board has also stated that federal court determinations, such as the court's acceptance of appellant's offer to make restitution in his criminal case, are not binding on either the Office or the Board.[3] The Board further notes that the Office was not involved with appellant's criminal case, was not consulted with reference to the amount of restitution, and ultimately lacks the statutory authority to accept an amount less than $9,512.44 as a "settlement" of this administrative matter.[4] Rather, the Office treated appellant's payment of $842.00 in the only manner it could under the Act and applied it against the $9,512.44 overpayment, leaving a balance due of $8,670.44. Accordingly, the Board finds that appellant's argument is without merit.

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[1] *Armando Barbosa*, 36 ECAB 474 (1985). While section 8106(b) requires only partially, not totally, disabled employees who are receiving compensation to report earnings from employment including self-employment, the Board has held that the test for determining partial disability "is whether, for the period under consideration, the employee was, in fact, totally disabled or merely partially disabled, and not whether he received compensation for that period for total or partial loss of wage-earning capacity."

[2] *Elbridge H. Wright*, 36 ECAB 691 (1985).

[3] *Nora M. Lewis*, 37 ECAB 245 (1985) *Wendy S. Warner*, 38 ECAB 103 (1986).

The Board further finds that the amount of the forfeiture is recoverable under section 8129 and the regulations promulgated thereunder contained in 20 C.F.R. section 10.314.[5] Section 8106(b)(2) provides that compensation forfeited, "if already paid, shall be recovered by a deduction from the compensation payable . . . or otherwise recovered under section 8129 . . ." Section 8129(a) provides that where an overpayment of compensation has been made "because of an error of fact or law," the overpayment "shall" be recovered. The only exception to this requirement is a situation which meets the test set forth in section 8129(a) which provides for waiver of the recovery of overpayment "when incorrect payment has been made to an individual who is without fault . . ." [6]

In determining whether an individual is with fault, the Office will consider all pertinent circumstances, including age, intelligence, education, and physical and mental condition. An individual is with fault in the creation of an overpayment who: (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or (2) Failed to furnish information which the individual knew or should have known to be material; or (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.[7]

In the present case it is apparent the Office applied the second standard-failure of the payee to furnish information which the payee knew or should have known to be material in finding appellant at fault in creating the overpayment. Since appellant knowingly failed to report earnings as required by section 8106 on Form CA-1032 he was not without fault and the recovery of the overpayment may not be waived. Even assuming that appellant informed the Office that he was returning to work on the September 25, 1981 CA-8 form, appellant never provided the Office with information on the amount of money he earned as a truck driver. Therefore he failed to furnish information which he knew, or should have known, to be material and he is not without fault with respect to the overpayment and the overpayment cannot be waived.

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[4] *Judd A. Mason*, 27 ECAB 470 (1976).

[5] 20 C.F.R. section 10.314(a) provides as follows: "(a) whenever by reasons of an error of fact or law an overpayment has been made to an individual who is entitled to further payments, proper adjustments shall be made by decreasing subsequent payments of compensation . . ."

[6] 5 U.S.C. section 8129(a); *See Fergus Tait*, 30 ECAB 929; *William W. Rodgers*, 30 ECAB 809.

[7] 20 C.F.R. section 10.320 (revised April 1, 1987).

The Board further finds that the Office improperly required 100 percent of appellant's continuing compensation withheld until the $9,512.44 overpayment was recovered.

The Office's regulations concerning recovery of all overpayments specify criteria the Office shall consider in determining the amount to decrease subsequent payments of compensation.[8] The regulations are specific in requiring the Office to have "due regard" to the probable extent of future compensation payments, the rate of compensation, the financial circumstances of the individual and "any other relevant factors so as to minimize any resulting hardship upon such individuals." The Office's collection of this overpayment by withholding 100 percent of continuing compensation without considering the effect of such action is in total disregard to the regulations which require consideration of specified factors "so as to minimize any resulting hardship upon such individuals."[9] Such action is contrary to the primary purpose of the Act to provide an adequate substitute for an employee's work-related loss of wage-earning capacity.[10]

The case will be remanded for the Office to determine an appropriate amount to decrease subsequent payments of compensation to recover the overpayment of compensation having due regard to the factors set forth in section 10.314(a) of its regulations. The Office shall restore to appellant any compensation withheld as a result of the June 3, 1987 decision.

The decisions of the Office of Workers' Compensation Programs dated July 16, 1986 and June 3, 1987 are hereby affirmed with respect to the issues of forfeiture and waiver of the overpayment of compensation. The June 3, 1987 decision is reversed with respect to the 100 percent withholding from continuing compensation, in accordance with the Director's Motion to Affirm in Part and Remand in Part. The case is remanded for further proceedings consistent with this decision of the Board to be followed by a *de novo* decision as to the amount to be withheld from continuing compensation to recover the overpayment.

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[8] 20 C.F.R. section 10.314(a).

[9] *Garland Little*, 38 ECAB 235 (1986); *Willis G. Lamb*, 38 ECAB 181 (1986). On March 27, 1987 the Board, in an order denied petitions for reconsideration of the aforementioned cases which were filed by the Director of the Office. The Board concluded that the Director, both in the petitions for reconsideration and in the oral argument held on the petitions before the Board on March 17, 1987, failed to demonstrate an error of fact or law warranting further consideration in that "he has failed to establish that section 10.110 of the Office's regulations is the sole provision for the adjustment or recovery of overpayments which arose due to forfeitures of compensation to the exclusion of section 10.314(a) of the Office's regulations." *Order Denying Petitions for Reconsideration*, Docket Nos. 86-843 and 86-1609 (issued March 27, 1987).

[10] *Garland Little* and *Willis G. Lamb*, *supra* note 9. *See also John W. Hart*, 27 ECAB 311 (1976).

In the Matter of BENJAMIN SWAIN *and* DEPARTMENT OF THE NAVY, NAVAL AIR STATION, Pensacola, Fla.

Docket No. 87-436; Submitted on the Record;
Issued January 29, 1988

Before GEORGE E. RIVERS, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issues are: (1) whether appellant has more than a 43 percent binaural (both ears) loss of hearing for which he received a schedule award; and (2) whether appellant may receive compensation for temporary total disability and under a schedule award covering the same period of time concurrently.

On November 3, 1975 appellant, a 44-year-old high voltage electrician, suffered second and third-degree burns to 55 percent of his body resulting from an explosion during the course of his federal employment. The Office of Workers' Compensation Programs accepted appellant's claim; authorized continuation of pay for the 45-day period beginning November 4, 1975; effective December 19, 1975 began paying him compensation benefits for temporary total disability; and subsequently placed appellant on the automatic roll.

By letter of October 23, 1978 the employing establishment's supervisory labor management relations specialist advised the Office that appellant was seeking permission to secure medical treatment for a problem with his ears which he attributed to the effects of the November 3, 1975 employment injury. The official, on appellant's behalf, submitted a medical report by Dr. William R. Wilson, an otolaryngologist, dated October 11, 1978.

Dr. Wilson reported that appellant had noticed a decrease in his ability to hear following the November 3, 1975 employment injury. The doctor reported that otologic examination on September 24, 1976 revealed that appellant's tympanic membranes appeared to be normal; that audiometric testing revealed bilateral sensorineural hearing loss accompanied by "a small 20 dB [decibel] air bone gap in the right ear;" and that no hearing aid was prescribed at that time because of appellant's hand injuries and the "surgical work being done on and about the face" as a result of the employment injury. Dr. Wilson further reported that he examined appellant in April 1978 at which time the bilateral sensorineural hearing loss remained present and was also associated with a conductive hearing loss noted in the left and right ears. The doctor concluded that appellant's "hearing difficulties are secondary to his accident."

By letter dated March 6, 1980 appellant requested treatment for his "hearing problem" which he attributed to the effects of the November 3, 1975 employment injury. In an April 15, 1980 reply, the Office requested that appellant submit a supplemental report by Dr. Wilson containing his rationalized medical opinion regarding the relationship of appellant's hearing condition to the November 3, 1975 employment injury.

Dr. Wilson replied in a May 5, 1980 letter referring the Office to his previous report of October 11, 1978, a copy of which he attached. Additionally, he stated that he had not seen appellant since April 1978 and recommended that appellant undergo a follow-up examination.

Based on an Office medical adviser's recommendation, the Office prepared a statement of accepted facts and referred it, together with appellant and the case record, to Dr. Robert L. King, Jr., a Board-certified otolaryngologist, for audiometric testing and an otologic evaluation.

Audiometric testing was conducted on Dr. King's behalf on July 25, 1980. After reviewing these results and his findings, the doctor concluded in his July 30, 1980 report that the "flash burn" and explosion were contributing factors to appellant's bilateral mixed loss of hearing, which was "primarily" sensorineural in nature. He concluded further that appellant should be fitted with a hearing aid to facilitate amplification.

The Office medical adviser applied the Office's standard procedures to the July 25, 1980 audiogram and concluded that appellant had sustained a 43 percent binaural loss of hearing causally related to the November 3, 1975 employment injury.

Consequently, by letter of September 12, 1980, the Office advised appellant that it had accepted that his loss of hearing was causally related to the November 3, 1975 employment injury and that it was authorizing Dr. King to fit him with hearing aids.

Appellant continued to receive compensation benefits for temporary total disability. On September 21, 1982 appellant filed an Office form CA-7, claim for compensation on account of traumatic injury, requesting that he be issued a schedule award for his employment-related loss of hearing.

In a letter dated November 8, 1982 the Office advised appellant, among other things, that although the medical evidence of record revealed that he had a 43 percent binaural loss of hearing and had reached maximum medical improvement in 1980, it could not, under the Federal Employees' Compensation Act, pay him compensation benefits for a schedule award concurrently with compensation for temporary total disability for the same injury. The Office further advised appellant that "*All*" employment-related conditions had to reach maximum medical improvement "before an award for any scheduled member can be considered," and that it would notify him regarding his schedule award entitlement once the medical evidence established that all of the conditions resulting from the November 3, 1975 employment injury had reached maximum medical improvement. (Emphasis in the original)

In a letter dated June 5, 1984 appellant requested that he be given an updated hearing evaluation and fitted with new hearing aids. The Office referred appellant to Dr. King. On July 13, 1984 appellant was audiometrically tested on Dr. King's behalf and was issued new hearing aids.

In a report dated August 8, 1986 Dr. Paul C. Dell, appellant's attending Board-certified orthopedic surgeon of professorial rank, stated, in response to an Office request, that appellant had reached maximum medical improvement.

On August 14, 1986, a second Office medical adviser reviewed the case record with regard to appellant's employment-related loss of hearing and concluded that appellant did not have an additional employment-related loss of hearing over the 43 percent binaural loss computed previously.[1]

By an award of compensation dated September 8, 1986 the Office granted appellant a schedule award for a 43 percent binaural loss of hearing for 86 weeks for the period July 25, 1980, the date of Dr. King's audiogram, through March 18, 1982. The Office included in the compensation award the following message:

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[1] The second Office medical adviser noted that appellant had sustained an additional loss of hearing. However, he concluded that this additional loss was not employment related. He explained that a noise-induced hearing loss was not considered as progressive because, *inter alia*, the following: there are no documented studies in the medical literature "supporting progressive deafness due to noise;" the "observed pattern of response to noise exposure is a loss followed by partial or total improvement upon removal from noise;" and generally, the loss of hearing induced "under a constant level of noxious noise" is generally "relatively large" per unit of time and subsequently becomes less and less "approaching nil." *Compare Adelbert E. Buzzell*, 34 ECAB 96 (1982) where the Board discounted the statement of the Office medical adviser that noise-induced hearing loss ceased after removal from hazardous occupational noise as it was unsupported by medical rationale.

> "We have changed our record to reflect a schedule award for the period shown above. You may wish to file to receive benefits from the Office of Personnel Management for this period since there is no prohibition against the concurrent payment of schedule award benefits and benefits of the U.S. Civil Service Retirement Act."

Appellant, through his attorney, contends on appeal that the schedule award issued to him for a 43 percent binaural loss of hearing was "not the subject of this appeal" as he was not disputing any of the Office's findings with regard to its issuance of the award. Notwithstanding, appellant contended that he was contesting the fact that the Office would not pay him compensation benefits for his schedule award concurrently with his compensation benefits for temporary total disability. In support of his contention appellant cited 5 U.S.C. section 8107(a) which provides:

> "(a) If there is permanent disability involving the loss, or loss of use, of a member or function of the body or involving disfigurement, the employee is entitled to basic compensation for the disability, as provided by the schedule in subsection (c) of this section, at the rate of 66⅔ percent of his monthly pay. The basic compensation is—
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>> '(1) payable regardless of whether the cause of the disability originates in a part of the body other than that member;
>>
>> '(2) payable regardless of whether the disability also involves another impairment of the body; and
>>
>> '(3) in addition to compensation for temporary total or temporary partial disability.' "

Additionally, appellant's attorney cited *Henry v. George Hyman Construction Co.*, 749 F.2d 65 (D.C. Cir. 1984) to support his contention.

Appellant's attorney stated that in the *Henry* case, the employee suffered an injury which entitled him to a schedule award under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. section 908(c)(4). The attorney noted that the employee, as in "the present case of the appellant here," was temporarily totally disabled "with an underlying permanent partial disability." He further noted, that the employer in the *Henry* case contended that "an award for temporary total disability could not be made concurrent with a schedule award." The attorney stated that the Court in

Henry held that "the plain language of the statute allows that a schedule award for permanent partial disability be paid concurrently with an award for temporary total disability." (Citation omitted)

In view of the holding in *Henry* and "the plain language of [5 U.S.C.] section 8107," appellant's attorney contended that appellant was entitled to receive his schedule award for 86 weeks' of compensation in addition to the compensation benefits he received for temporary total disability.

The Board finds that appellant has no more than a 43 percent employment-related binaural (both ears) loss of hearing for which he received a schedule award.

The schedule award provisions of the Federal Employees' Compensation Act set forth the number of weeks of compensation to be paid for permanent loss of use of the members of the body listed in the schedule. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of the Office.[2] However, as a matter of administrative practice the Board has stated: "For consistent results and to insure equal justice under law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants."[3]

In *Richard Beggs*,[4] the Board reviewed two standards used by the Office in determining the extent of permanent impairment in cases involving the evaluation of hearing loss. The first standard, utilized prior to February 28, 1973, was based on the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (first edition) which provided that the percentage loss of hearing was to be measured at three levels: 500, 1,000 and 2,000 cycles per second.[5] After February 28, 1973 the Office evaluated hearing loss claims in accordance with the standards of the National Institute for Occupational Safety and Health (NIOSH) as set forth in its publication *Occupational Exposure to Noise*.[6] This standard differed from those of the A.M.A. *Guides* in that the percentage loss of hearing was measured at 1,000, 2,000 and 3,000 cycles per second.[7] In *Beggs*, the Board noted that A.M.A. *Guides* and NIOSH standards both provided the same averaging method of determining whether there is a ratable loss of hearing.[8] Where the average hearing loss at the respective frequency levels is 25 decibels or less there is no ratable loss for, as the *Guides* point out, in such situations no impariment exists in the ability to hear everyday speech under everyday conditions.[9]

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[2] *Richard Beggs*, 28 ECAB 387 (1977); *Danniel C. Goings*, 37 ECAB 781 (1986).

[3] *August M. Buffa*, 12 ECAB 324 at 325 (1961); *Henry L. King*, 25 ECAB 39 at 44 (1973).

[4] 28 ECAB 387 (1977).

[5] American Medical Association's *Guides to the Evaluation of Permanent Impairment*, pp. 103-107 (1st ed 1971). *See Melvin E. Singleton*, 17 ECAB 410 (1966), 19 ECAB 108 (1967); *Wilbert W. Brown*, 20 ECAB 205 (1969).

[6] *Occupational Exposure to Noise*, published in 1972 by the U.S. Department of Health, Education and Welfare, Health Services and Mental Health Administration, National Institute for Occupational Safety and Health Act. The National Institute was established by section 7(a) of the Occupational Safety and Health Act, 84 Stat. 1597.

The Board notes that on February 24, 1986 the Office adopted a new standard for determining the extent of permanent impairment in hearing loss.[10] This standard is based on the formula contained in the second edition to the A.M.A. *Guides* published in 1984.[11] As noted by the Office Program Memorandum No. 272:

> "The A.M.A.'s formula calculates the hearing loss for one ear (monaural) by testing for hearing loss at the 500, 1,000, 2,000 and 3,000 frequency levels. The losses at each frequency are added up and averaged and, using ANSI-ISO standards, the 'fence' of 25 decibels is deducted from the average loss. The result is multiplied by 1.5 to arrive at monaural hearing loss. To determine the loss for both ears (binaural), the loss in each ear is calculated using the formula for monaural loss. The lesser is multiplied by 5, then added to the greater loss. The total is divided by 6 to arrive at the binaural loss."

The Office has adopted this new standard in order that programs administered by the agency are consistent in their hearing loss evaluation procedures. Further, this standard was made applicable to all hearing loss evaluations made on or after February 24, 1986.[12]

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[7] *See Terry A. Wethington*, 25 ECAB 247 (1974), in which the Board approved the use of the NIOSH standards as an appropriate procedure for measuring hearing loss.

[8] 28 ECAB 387 at 391, 392.

[9] *See Carl E. McGinnis*, 16 ECAB 360 (1965); *Dewey H. Burchett*, 28 ECAB 393 (1977); *Jack R. Lingren*, 35 ECAB 676 (1984). The Board notes that this is assuming the audiogram is based on ISO-ANSI calibration.

[10] FECA Program Memorandum No. 272 (issued February 24, 1986). The Program Memorandum notes that in amendments made to the Longshoremen's and Harbor Workers' Compensation Act Congress mandated the use of the formula of the A.M.A. *Guides* (2nd ed. 1984). *See also Danniel C. Goings*, *supra* note 2.

[11] American Medical Association's *Guides to the Evaluation of Permanent Impairment*, pp. 153-158 (2nd ed. 1984).

[12] In cases where a claimant has applied for review, either by reconsideration or by the Branch of Hearings and Review, the case will be reviewed using the formula in use at the time of the original decision if there has been no further noise exposure. In cases of additional noise exposure the new formula will be applied. *See* FECA Program Memorandum No. 272 (issued February 24, 1986); *Danniel C. Goings*, *supra* note 2.

The Office referred appellant to Dr. King, a Board-certified otolaryngologist, for an otologic evaluation and audiometric testing. Following Dr. King's otologic evaluation and the audiometric testing conducted on July 25, 1980, the doctor reported on July 30, 1980 that appellant had sustained a mixed bilateral loss of hearing which was "primarily" sensorineural in nature as a result of the November 3, 1975 employment injury.

The first Office medical adviser applied the Office's standards to the result of Dr. King's July 25, 1980 audiogram and concluded that appellant had a 43 percent binaural loss of hearing. Although appellant underwent an examination by Dr. King on July 13, 1984, as noted by the second Office medical adviser, appellant did not sustain an additional employment-related loss of hearing.[13] Thus, the Board finds that the Office properly determined that appellant had a 43 percent binaural loss of hearing.

With regard to appellant's contention on appeal, the Board notes that it is well-settled that a claimant is not entitled to dual workers' compensation benefits for the same injury. He may not receive compensation for temporary total disability and under a schedule award covering the same period of time.[14] As Larson [15] points out, generally "the schedule award is added to the allowance for temporary total disability." However, he makes clear that both benefits are not to be paid concurrently. In comparing schedule benefits with other benefits provided under workers' compensation laws for an injury, he notes, "It goes without saying that, when the statute provides parallel remedies for the same injury, it is not intended that claimant should have both." [16] With respect to the Federal Employees' Compensation Act, the Board has held that "An employee cannot concurrently receive compensation under a schedule award and compensation for disability for work."[17]

In the instant case, appellant began receiving compensation benefits for temporary total disability effective December 19, 1975, and continuing. His schedule award for a 43 percent binaural loss of hearing commenced on July 25, 1980 the date appellant reached maximum medical improvement per Dr. King's examination,[18] and was to end on March 18, 1982; thus, appellant's compensation was altered from temporary total disability to a schedule award.[19] However, the period of appellant's entitlement to a schedule award overlapped with the period he was entitled to receive compensation benefits for temporary total disability. Since, as the Board has held, that under the Act an employee may not receive concurrent compensation payments for a schedule award and temporary total disability, for the period July 25, 1980 through March 18, 1982 appellant was only entitled to receive compensation benefits for his schedule award. Upon the expiration of the schedule award, the Office properly reinstated appellant's compensation benefits for temporary total disability until it met its burden of justifying termination or reduction of compensation benefits for temporary total disability.[20] The medical evidence of record revealed that appellant continued to be totally disabled; *ergo,* his compensation benefits were continued.[21]

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[13] *See supra* note 1.

[14] *Robert T. Leonard*, 34 ECAB 1687 (1983); *Marie J. Born*, 27 ECAB 623 (1976).

[15] Larson, *Workmen's Compensation Law*, section 58.15.

[16] *Id.*, section 58.20, n. 42.

[17] *Robert T. Leonard*, 34 ECAB 1687, 1690 (1983); *Andrew B. Poe*, 27 ECAB 510, 512 (1976).

[18] The period covered by a schedule award commences on the date that the employee reaches maximum improvement from the residuals of the injury. Maximum improvement means that the physical condition of the injured member of the body has stabilized and will not improve further. *Marie J. Born*, *supra* note 14.

In view of the foregoing, the Board concludes that appellant's contention on appeal is without merit.

The decision of the Office of Workers' Compensation Programs, dated September 8, 1986, is hereby affirmed.

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[19] *See generally, Goldie Washington,* 31 ECAB 239 (1979).

[20] *Id.*

[21] The Board notes that although the Office indicated on appellant's award of compensation that he could file or elect to receive benefits from OPM during the period the schedule award ran concurrently with his schedule award, this was proper as an employee who is entitled to a schedule award may receive compensation under the schedule award simultaneously with a civil service annuity. *See Charles E. Watkins, Jr.,* 28 ECAB 632. *See also* 5 U.S.C. section 8116(a); 20 C.F.R. section 10.313(a).

In the Matter of JAMES BAIN, JR. *and* DEPARTMENT OF THE NAVY, CHARLESTON NAVAL SHIPYARD, Charleston, S.C.

Docket No. 86-1516; Hearing April 16, 1987;
Issued February 8, 1988

Appearances: *Stuart A. Feldman, Esq.,* for appellant; *Sheldon G. Turley, Jr., Esq.,* for the Director, Office of Workers' Compensation Programs.

Before GEORGE E. RIVERS, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether appellant has a loss of wage-earning capacity after December 30, 1985 causally related to his April 24, 1984 employment injury.

On May 1, 1984 appellant, then a 39-year-old rigger, filed a claim for a left ear injury sustained on April 24, 1984 by diving. Appellant stopped work on April 25, 1984 and returned to light duty on May 1, 1984 with no heavy lifting, hazardous locations, or diving.

Appellant was examined at the employing establishment's hospital on May 1, 1984 by Dr. W.S. Hayes, a Board-certified otolaryngologist, who diagnosed barotrauma of the left ear and prohibited diving for two weeks.

Appellant again stopped work on May 10, 1984 and did not return. He resigned effective September 24, 1984.

Dr. Hayes referred appellant to Dr. Warren Y. Adkins, a Board-certified otolaryngologist, who in a June 20, 1984 report, noted a history of post-dive vertigo in 1975 followed by exploratory tympanotomy and a repair of a fistula in the left ear with a resolution of symptoms and no further difficulty until the April 24, 1984 incident. Dr. Adkins diagnosed dizziness of undetermined etiology by history secondary to barotrauma, mild left external otitis, and a questionably positive fistula test on the left. In an August 9, 1984 report Dr. Adkins diagnosed perilymphatic fistula and stated this condition was causally related to the April 24, 1984 incident as the history and findings were compatible with a fistula which was healed or healing.

In an August 29, 1984 report Dr. Hayes stated that it was Dr. Adkins' recommendation and his, that appellant not resume diving.

The employing establishment reported that appellant's position was rigger, but that he was qualified as a diver and was thus given extra pay assignments as a diver as such assignments arose. It also reported the amount of such extra pay appellant had received since it had determined that he was physically qualified for diving in February 1984.

In a February 12, 1985 report Dr. Adkins stated that the testing, findings, examination, and history suggested that appellant's fistula had closed, that no further treatment was needed, and "with presumed fistula x2 secondary to barotrauma with diving, I would advise the patient not to resume this occupation in future due to increased risk of repeat fistulization."

In an April 30, 1985 report submitted in response to an inquiry from the Office of Workers' Compensation Programs, Dr. Adkins stated that when appellant was last seen on February 12, 1985 he was asymptomatic and had no difficulty with dizziness. Dr. Adkins repeated the Office's second question and replied to it as follows:

> "2. Are there any work restrictions due to the injury of April 24, 1984? Please separate these into two groups. The first should be restrictions required as a result of the residual impairments.
>
> "No restriction as result of residual impairment.
>
> "The second group should be those restrictions that are merely prophylactic (that is those simply to prevent future injury).
>
> "With presumptive diagnosis of healed fistula, the patient will be at increased risk of refistulization secondary to barotrauma. I would, therefore, recommend that he not resume work as a diver."

By compensation order dated July 19, 1985 the Office, which had previously authorized continuation of pay for 45 days following appellant's injury, found that appellant had no remaining or compensable disability due to his April 24, 1984 employment injury.

Appellant requested reconsideration and submitted a September 26, 1985 letter from Dr. J. S. Cassells, a Rear Admiral in the Naval Medical Corps and Commander of the Naval Medical Command. Dr. Cassells stated:

> "Mr. Bain does not meet Department of the Navy physical standards for diving duty by reason of documented history of left inner ear barotrauma with associated recurrent perilymph fistula.
>
> "Inner ear barotrauma is a serious otological injury which has the potential for the development of permanent sensory neural hearing loss, occasional incapacitating vertigo, and meningitis due to the presence of infection via an inner ear membrane fistula. Thirty percent of inner ear barotrauma cases will have permanent symptoms after the initial injury. Review of Mr. Bain's medical record noted a left inner ear barotrauma due to diving in 1974 and also a history of recurrent episodes of vertigo following dives that had been performed during 1984. The findings are consistent with the diagnosis of recurrent left perilymph fistula. Mr. Bain's symptoms clearly

> indicate that he has an abnormal left inner ear which now is quite susceptible to pressure changes associated with diving. This condition will not improve and is considered permanent. Continuation of diving duties with repeated hyperbaric exposure will serve only to exacerbate the condition. The occurrence of vertigo in a diver at depth not only can cause panic and disorientation but also greatly increases the risk of death by drowning. Consequently, we determined that a waiver for continuation of diving duties was not appropriate. Mr. Bain should no longer dive either professionally or recreationally."

By compensation order dated October 16, 1985 the Office vacated its July 19, 1985 decision; an Office hearing representative remanded the case to the Office for determination of appellant's loss of wage-earning capacity due to his April 24, 1984 injury on the basis that residuals of the accepted condition of healed fistula placed appellant at an increased risk for refistulization secondary to barotrauma thereby precluding him from resuming diving.

The Office paid appellant compensation for temporary total disability from September 25, 1984 to December 30, 1985 (less his actual earnings during a portion of this period).

By a December 13, 1985 letter the Office requested that Dr. Adkins answer additional questions regarding appellant's condition. In a December 30, 1985 report Dr. Adkins repeated the Office's questions and provided the following answers:

> "1. Has the patient physically returned to the same baseline condition he occupied prior to the incident of April 24, 1984? My best information would indicate that the patient has returned to his baseline condition.
>
> "2. Are the restrictions you placed on him due to some physical modification to the patient caused by the April 24, 1984 incident or are they prophylactic based on the history of the two previous problems in a effort to prevent a third? Restrictions are prophylactic based on history of two previous problems secondary to activity involving sudden changes in pressure."

By a compensation order dated March 5, 1986 the Office found that appellant had no residual impairment from his April 24, 1984 employment injury, that the restriction against diving was prophylactic to prevent a third injury, and that he had no remaining compensable disability after December 30, 1985.

Appellant, through his attorney, requested reconsideration, contending that a loss of wage-earning capacity was established because of appellant's inability to perform the duties of the job he held when injured due to residuals of the injury.

By a compensation order dated May 1, 1986 the Office found the additional evidence insufficient to warrant modification of its prior decision, finding that the mere possibility that work activities could cause a disabling recurrence of a condition was not a basis for payment of compensation.

The Board finds that the case is not in posture for decision.

The medical question that remains to be resolved in this case is whether appellant has any permanent work-related residuals from his April 24, 1984 employment injury which cause any disability for work. If residuals of appellant's April 24, 1984 employment injury prevent him from performing the duties of the job he held when injured, which included diving for which he received premium pay, he is disabled within the meaning of the Federal Employees' Compensation Act, and has a partial loss of wage-earning capacity.[1] On the other hand, if there are no residuals of appellant's employment injury and his disqualification for diving is due to an underlying condition without any contribution by the employment, he is not entitled to compensation under the Act.

The Board differentiated these two situations in the cases of *Dennis L. O'Neill* and *James L. Hearn*. In *O'Neill*, the Board stated:

> "If the medical evidence establishes that residuals of an employment-related impairment are such that, from a medical standpoint, they prevent the employee from continuing in the employment, he is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity." [2]

In *Hearn*, the Board stated:

> "Where employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for periods of disability related to the aggravation. However, where, as in the present case, the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased. This is true even though the employee is found medically disqualified to

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[1] The Board has frequently stated that the test of "disability" is whether an employment-related impairment prevents the employee from engaging in the kind of work he was doing when injured. *David H. Goss*, 32 ECAB 24 (1980); *Melvin Hoff, Sr.*, 27 ECAB 458 (1976); *Harold T. Foy*, 14 ECAB 451 (1963).

[2] *Dennis L. O'Neill*, 29 ECAB 259 at 261 (1978).

> continue in such employment because of the effect which the employment factors might have on the underlying condition. Under such circumstances, his disqualification for continued employment is due to the underlying condition, without any contribution by the employment." [3]

In the present case the medical evidence is insufficient to permit informed adjudication of the question of whether appellant's employment injury resulted in a temporary aggravation of an underlying condition with no resulting permanent residuals, *(Hearn)* or whether the employment injury caused a new condition or interacted with an underlying condition, with resulting permanent residuals which continue to cause appellant to have disability for work. *(O'Neill)*

Dr. Adkins, a Board-certified otolaryngologist who was one of appellant's attending physicians following his April 24, 1984 employment injury, provided both answers to the question posed in the paragraph above. In a February 12, 1985 report Dr. Adkins stated that appellant should not resume diving "due to increased risk of repeat fistulization," and in an April 30, 1985 report stated "with presumptive diagnosis of healed fistula, the patient will be at increased risk of refistulization secondary to barotauma." However, in the April 30, 1985 report Dr. Adkins also stated that appellant had "no restriction as result of residual impairment," and in a December 30, 1985 report stated that appellant "has returned to baseline condition," and that his "restrictions are prophylactic. * * *"

The report from Dr. Cassels also does not establish that appellant has permanent residuals of his employment injury which cause disability for work. Although Dr. Cassells stated that appellant "has an abnormal left inner ear which now is quite susceptible to pressure changes associated with diving" and that this condition was permanent, the doctor did not state that appellant's "abnormal left inner ear" was caused or permanently aggravated by his April 24, 1984 employment injury. In addition, Dr. Cassells' report is of reduced probative value because he did not examine appellant and because the case record does not show Dr. Cassells has any particular expertise to address the question to be resolved in this case.

On remand, the Office should refer appellant, a statement of accepted facts and the case record, to an appropriate medical specialist for a reasoned opinion whether appellant has residuals of his April 24, 1984 employment injury which make him more susceptible to or place him at increased risk of future injury if he were to dive. The Office should evaluate the specialist's report in light of the legal principles enunciated in *James L. Hearn* and *Dennis L. O'Neill*. After such further development as it deems necessary, the Office should issue a *de novo* decision.

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[3] *James L. Hearn*, 29 ECAB 278 at 287 (1978).

The decisions of the Office of Workers' Compensation Programs dated March 5, 1986 and May 1, 1986 are set aside and the case remanded to the Office for further action in accordance with this decision of the Board.

In the Matter of CHARLES H. TOMASZEWSKI *and* U.S. POSTAL SERVICE, POST OFFICE, Haddam, Conn.

Docket No. 88-261; Submitted on the Record;
Issued February 11, 1988

Before GEORGE E. RIVERS, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether appellant has met his burden of proof in establishing that he sustained a recurrence of disability on January 15, 1985 causally related to his April 11, 1983 employment injury.

On April 13, 1983 appellant, then a 31-year-old rural mail carrier, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that on April 11, 1983 he sustained an injury to his right knee while in the performance of duty when the end railing of a mail loading truck he was pushing "lifted out and caught him off balance." The record indicates that appellant lost no time from work but performed light duty from April 13 to April 17, 1983 and returned to full duty on April 18, 1983.

Appellant's Form CA-1 indicates that he first received medical treatment on April 13, 1983 from Dr. Charles M. Winterhalter, a general practitioner with a subspecialty in occupational medicine. On a duty status report dated April 13, 1983, Dr. Winterhalter diagnosed appellant's condition as "mild strain right lateral ligament of right knee." Appellant was subsequently examined by Dr. Richard M. Campbell-Jacobs, a Board-certified orthopedic surgeon, who, in an attending physician's report dated April 29, 1983, stated that "[appellant] twisted [his right] knee while lifting a piece of equipment at work" and diagnosed his condition as "probable meniscus tear versus strain right knee."

The Office of Workers' Compensation Programs accepted appellant's claim for "right knee strain" and paid appellant's medical expenses incurred for treatment to his right knee during the period April 13, 1983 to May 11, 1983.

On January 27, 1985, appellant filed a recurrence of disability claim (Form CA-2a) alleging that on January 15, 1985, he sustained a recurrence of pain in his right knee causally related to his April 11, 1983 employment injury. Appellant's Form CA-2a indicates that he lost no time from work immediately following his alleged recurrence of disability and first received medical treatment on January 16, 1985. Appellant submitted with his claim the January 16, 1985 report of Dr. Campbell-Jacobs which stated as follows:

> "Examination today confirms pain in the right knee. McMurray testing is positive. Tender in the joint line. In addition, he is also tender over the medial femoral condyle. I think I feel a spur there that may well be arthritic. X-ray of the area, however, shows no evidence of arthritis. I think the problem is then based upon the torn meniscus. I recommended arthroscopy. [Appellant] has agreed to that. That will be done on the 4th of February."

The record indicates that appellant is seeking reimbursement of medical expenses and compensation for time lost from work in February and March 1985 due to his hospitalization for the arthroscopy to his right knee and subsequent recuperation.

By letter dated February 13, 1985, the Office requested that appellant submit additional factual and medical information in support of his claim. In response to this request, appellant submitted a personal narrative statement dated February 22, 1985 in which he described his employment duties and stated that he had experienced chronic pain in his right knee ever since his April 11, 1983 employment injury. In a second personal statement dated September 25, 1985 appellant informed the Office that in his original employment injury of April 11, 1983, his right knee was hit by the mail loading cart he was pushing and he immediately experienced a sharp pain in his knee.

As supporting medical evidence, appellant submitted the February 21, 1985 attending physician's report of Dr. Campbell-Jacobs who diagnosed appellant's condition as "chondromalacia right medial compartment [right] knee," indicated that he believed this condition was related to appellant's April 11, 1983 employment injury and stated that appellant could resume work in a light duty capacity on February 18, 1985. Appellant also submitted Dr. Campbell-Jacobs' treatment notes for the period April 13, 1983 to May 16, 1985 and the doctor's report describing the arthroscopy performed on appellant on February 4, 1985. In the arthroscopy report, Dr. Campbell-Jacobs gave a preoperative diagnosis of "rule out tear of right medial meniscus" and a postoperative diagnosis of "chondromalacia, right medial compartment." In this report, Dr. Campbell-Jacobs stated in relevant part as follows:

> "Using a needle localization, the probe was introduced in the anterior medial compartment and inspection begun in the medial meniscus. It was probed in its entirety, anteriorly and medially, no abnormalities could be seen. Coming into the posterior medial compartment, however, it was quite obvious that he had chondromalacia of the posterior tibial spine associated with a corresponding level of chondromalacia on the medial femoral condyle. The posterior horn of the meniscus was seen although there was slight knobbing, it did not seem that there was any obvious tears and no tears of the meniscus requiring excision. The entire meniscus was seen and probed.
>
> * * *
>
> ". . . the lateral meniscus was again seen, reprobed and no obvious tears seen. Coming back into the medial compartment, the medial meniscus was again seen and probed and had no obvious tears."

By letter dated November 25, 1985, the Office notified appellant that unless he submitted a detailed narrative medical report from his treating physician causally relating his condition, for which he received treatment in February 1985, to his April 11, 1983 injury, his claim would be denied.

Appellant subsequently submitted the December 10, 1983 report of Dr. Campbell-Jacobs which stated as follows:

> "The surgery of February of 1985 was a direct result of [appellant's] injury of April 1983."

On December 18, 1985, the Office referred appellant's case file, together with a statement of accepted facts and a list of specific questions, to Dr. Robert Y. Pick, a Board-certified orthopedic surgeon acting as an Office medical consultant, for review and evaluation.

In a report dated December 20, 1985, Dr. Pick stated in relevant part as follows:

> "Based on review of the entire medical evidence of record, it is my considered opinion that the operative procedure of February 4, 1985 is totally unrelated to the occupational incident of April 11, 1983.
>
> * * *
>
> ". . . it is my considered opinion that the occupational incident of April 11, 1983 was consistent with a right knee strain. The case file does not contain a copy of the arthrogram that was performed in 1983, and thus Dr. Campbell-Jacobs' statement that the arthrogram revealed 'slight abnormality' is of no consequence, without specific description of this 'abnormality.' Furthermore, the fact that claimant was not followed by Dr. Campbell-Jacobs for over a year and half, as well as the fact that not even symptomatic treatment was rendered, mitigates against any significant injury as a result of the occupational incident of April 11, 1983.
>
> "The findings on arthroscopy performed on February 4, 1985, namely 'chondromalacia, right medial compartment [right knee] has not been established as being consistent with the occupational incident of April 11, 1983.'
>
> "The arthroscopy confirmed that claimant's medial meniscus was not damaged, and consequently the diagnosis rendered in April, 1983 of a 'probable meniscus tear' is not established and thus the secondary diagnosis of 'strain right knee' is established.
>
> "It is my considered opinion that the chondromalacia found at arthroscopy performed on February 4, 1985, is on a degenerative basis, and not attributable to claimant's factors of employment, much less to the occupational incident of April 11, 1983.
>
> "Dr. Campbell-Jacobs' one line sentence in a medical report dated December 10, 1985 [that] 'the surgery of February, 1985 was a direct result of [appellant's] injury of April, 1983' is purely speculative, and unsubstantiated."

By compensation order dated January 24, 1986, which incorporated a memorandum summarizing the evidence, the Office denied appellant's claim for compensation on the basis that appellant failed to submit rationalized medical opinion evidence in support of his claim for recurrence of disability and, therefore, failed to discharge his burden of proof. In the order of January 24, 1986 the Office terminated any prior authorization for medical treatment.

By letter dated February 14, 1986, appellant requested a hearing before an Office hearing representative. By notice of hearing dated October 17, 1986, the Office scheduled a hearing for November 20, 1986.

Prior to the hearing, appellant submitted the February 4, 1986 report of Dr. Campbell-Jacobs which stated, in relevant part, as follows:

> "[Appellant] was first seen by me on April 13, 1983, when he had a twisting injury to his right knee that gave him positive symptoms which I thought were from a torn meniscus. I treated him symptomatically, and he responded somewhat, but on April 27 was still having some pain.
>
> "Because of that pain, I recommended an arthrogram which was done. It showed a suspected tear of the medial meniscus on May 11, 1983.
>
> "Because of the abnormality, arthroscopy was suggested at that time, but he wished to delay it because his wife was having a baby.
>
> "His symptoms did not improve, and on February 4, 1985, he underwent the arthroscopy and debridement of the knee joint.
>
> "He went back to his regular job on March 5, 1985, and continues at that job.
>
> "There is no doubt in my mind the whole problem, symptoms and surgery, are related to his initial injury at work."

Appellant also submitted the May 11, 1983 report of Dr. Erik Pingoud, a Board-certified radiologist, who described the arthrogram procedure, and findings therefrom, performed on appellant's right knee on May 11, 1983. This report stated as follows:

> "Right knee arthrography was performed in routine fashion utilizing the double contrast technique.
>
> "The right medial meniscus shows some slight irregularity at its inferior margin involving the posterior horn. No frank tear is seen. The lateral meniscus is normal. There is a very small popliteal cyst.
>
> "Conclusion: 1. Slight irregularity involving the inferior surface of the posterior horn of the medial meniscus. 2. Small Baker's cyst."

At the hearing held on November 20, 1986, appellant testified that he had sustained "a tear in the knee, some place underneath the knee cap" in his original injury of April 11, 1983 and that since this injury, he had "more or less continuous" pain in his right knee with the pain being more pronounced in cold weather. He also testified that the pain seemed unrelated to activity. The Office hearing representative reviewed with appellant the deficiencies in the medical reports submitted by appellant in support of his claim. In particular, the Office hearing representative noted that the reports of Dr. Campbell-Jacobs' described the history of appellant's injury differently from the account of the injury given by appellant. The Office hearing representative pointed out that Dr. Campbell-Jacobs stated that appellant twisted his knee while appellant had stated his knee had been hit. The Office hearing representative then proceeded to describe the information which should be included in a physician's report in order for appellant to meet his burden of proof and agreed to leave the record open for an additional fifteen days to afford appellant the opportunity to submit additional medical evidence. The record indicates that appellant did not submit additional medical evidence within the time allotted by the Office hearing representative.

In a decision dated and finalized December 24, 1986, the Office hearing representative affirmed the January 24, 1986 decision of the Office finding that appellant had not submitted the type of medical evidence necessary to meet his burden of proof in establishing a causal relationship between his recurrent disability and his original employment injury. The Office hearing representative noted that while appellant's physician, Dr. Campbell-Jacobs, supported causal relationship, his opinion was not based upon a proper factual and medical background.

By undated letter, received by the Office on March 31, 1987, appellant requested reconsideration of his case and in support of reconsideration submitted the March 3, 1987 report of Dr. Campbell-Jacobs which stated as follows:

> "[Appellant] appeared in my office today with details in writing of a hearing regarding his injury to his knee in 1983. There were several areas of concern in the report, and I am trying to put them right with this letter.
>
> "One area of concern was whether or not his injury was a twist or a bang initially. I think that it is insignificant and makes no difference in the details of the course of his history.

> "The next area of contention is the fact that he did not have a torn meniscus at surgery but did have chondromalacia of the right medial compartment of that knee.
>
> "It is my feeling that the findings at arthroscopy are consistent with the history of injury whether it is a twist or a bang, and that the reasons he was arthroscoped in 1985 is because of an injury to his knee at work in 1983."

By compensation order dated June 23, 1987, which incorporated a memorandum summarizing the evidence, the Office reviewed appellant's case on the merits under 5 U.S.C. section 8128 and denied modification of its prior decisions on the basis that the evidence submitted by appellant lacked probative value and was therefore insufficient to warrant modification of the prior decisions. The Office noted that the March 3, 1987 report of Dr. Campbell-Jacobs offered no rationale for his opinion in support of causal relationship.

The Board finds that appellant has not met his burden of proof in establishing that he sustained a recurrence of disability on January 15, 1985 causally related to his April 11, 1983 employment injury.

Where appellant claims a recurrence of disability due to an accepted employment-related injury he has the burden of establishing by the weight of substantial, reliable and probative evidence that the recurrence of the disabling condition for which he seeks compensation was causally related to the accepted employment-injury.[1] As part of this burden, appellant must submit rationalized medical opinion evidence based on a complete and accurate factual and medical background showing a causal relationship between the current disabling condition and the accepted employment-related injury.[2]

The medical evidence submitted by appellant in support of his claim was neither based on an accurate factual and medical background of appellant nor did such evidence contain rationalized medical opinion establishing a causal relationship between appellant's disabling condition of January 1985 and his accepted employment-related injury.

The Office of Workers' Compensation Programs accepted appellant's April 11, 1983 traumatic injury claim for "right knee strain." Appellant's disabling condition allegedly commencing on January 15, 1985 was diagnosed by his physician, Dr. Campbell-Jacobs, a

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[1] *See Henry L. Kent*, 34 ECAB 361 (1982); *Dennis E. Twardzik*, 34 ECAB 536 (1983).

[2] *Steven J. Wagner*, 32 ECAB 1446 (1981).

Board-certified orthopedic surgeon as "chondromalacia right medial compartment [right] knee." In a report dated December 10, 1985, Dr. Campbell-Jacobs opined that this condition, for which appellant underwent surgery in February, 1985, was a direct result of appellant's April 1983 employment injury, but he offered no probative medical rationale in support of his opinion. In a subsequent report dated February 4, 1986, Dr. Campbell-Jacobs stated that appellant sustained a twisting injury to his right knee in April 1983 and exhibited symptoms of a torn meniscus and that the arthrogram performed on May 11, 1983 showed a suspected tear of the medial meniscus. Dr. Campbell-Jacobs concluded this report by stating that "There is no doubt in my mind that the whole problem, symptoms and surgery are related to his initial injury at work."

The Office hearing representative, at the hearing held on November 20, 1986, pointed out to appellant the deficiencies in Dr. Campbell-Jacobs' report of February 4, 1986. Dr. Campbell-Jacobs described appellant's original employment injury as a "twisting injury" to his right knee but appellant claimed that his right knee was hit by the mail cart. Dr. Campbell-Jacobs stated that the May 11, 1983 arthrogram showed a suspected tear of the medial meniscus. However, the report of Dr. Pingoud, a Board-certified radiologist, who performed the arthrogram on May 11, 1983, stated that while the right medial meniscus showed some slight irregularity "no frank tear" or "clearcut tear" was seen or noted. The arthroscopy performed on appellant in February 1985 by Dr. Campbell-Jacobs confirmed that there were no tears of the right medial meniscus. Although Dr. Campbell-Jacobs concluded his February 4, 1986 report with an opinion supporting causal relation, again, he offered no probative medical rationale in support of his position.

The report of Dr. Campbell-Jacobs dated March 3, 1987, submitted to correct the deficiencies in his February 4, 1986 report, failed to achieve its purpose. Dr. Campbell-Jacobs stated that the history of appellant's injury was insignificant and indicated that so too was the fact that appellant had chondromalacia of the right medial compartment of the knee and not a torn meniscus because the "findings of the arthroscopy are consistent with the history of injury whether it is a twist or a bang and that the reason [appellant] was arthroscoped in 1985 is because of an injury to his knee at work in 1983." Dr. Campbell-Jacobs offers no explanation as to how appellant's accepted injury of "right knee strain" developed into chondromalacia of the right medial compartment of the right knee and why it makes no difference to the development of this condition whether his initial injury was a twist or a bang to the knee.

An award of compensation may not be based on surmise, conjecture or speculation.[3] Medical opinions submitted in support of a claim cannot be speculative but must be supported by medical rationale and be based on an accurate and complete factual and medical background of the employee and his conditions and incidents of employment.[4] Dr. Campbell-Jacobs' reports did not meet this criteria and, consequently, are of little probative value to appellant's case and insufficient to substantiate his claim.

The Board finds that the weight of medical evidence rests with the December 20, 1985 report of Dr. Pick, a Board-certified orthopedic surgeon, acting as an Office medical consultant, who negated causal relationship between appellant's condition of January 1985 and his employment injury of April 1983. In his well-reasoned report, Dr. Pick found that appellant's employment incident of April 11, 1983 was consistent with "right knee strain" but that his subsequent condition of "chondromalacia, right medial compartment of right knee" was not consistent with his accepted employment condition and the medical evidence of record failed to establish a relationship between the two. In this regard, Dr. Pick noted that for a year and a half, not even symptomatic treatment was rendered to appellant for his right knee which mitigates a finding of any significant injury as a result of the April 11, 1983 employment incident. Dr. Pick further noted that the arthroscopy performed on appellant in February 1985 confirmed that appellant's medial meniscus was not damaged and opined that the chondromalacia was, therefore, a result of degeneration and not attributable to either factors of appellant's employment or his April 11, 1983 employment injury.

The Board finds that the medical evidence of record fails to establish a causal relationship between appellant's condition of January 1985 and his April 11, 1983 employment injury.

The decisions of the Office of Workers' Compensation Programs dated December 24, 1986 and June 23, 1987 are hereby affirmed.

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[3] *Walter J. Neumann, Sr.*, 32 ECAB 69 (1980).

[4] *See Walter J. Neumann, Sr.*, note 3, *supra*.

In the Matter of CARL PAUL JOHNSON *and* DEPARTMENT OF THE AIR FORCE, WRIGHT-PATTERSON AIR FORCE BASE, Dayton, Ohio

Docket No. 88-223; Submitted on the Record;
Issued February 12, 1988

Before GEORGE E. RIVERS, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether appellant's detached retina in the right eye was sustained in the performance of his federal employment.

Appellant, a 54-year-old engineer, filed a claim on November 5, 1986 alleging that he sustained a detached retina in the right eye, which he first became aware of on September 26, 1984 and which he related to his federal employment. Attached statements provided by appellant and the employing establishment noted that appellant had been employed as a Supervisory Systems Management Engineer since January 23, 1983, at the Wright-Patterson Air Force Base, and was assigned to temporary duty from September 24 through September 28, 1984 to participate in a "software preliminary design review" conference in the Los Angeles metropolitan area.

Appellant, in describing the development of his eye condition stated that he first experienced spots in his eye at home, on September 21, 1984, which he attributed to fatigue. He had no further symptoms until the morning of September 26, 1984, after arriving at the conference, when he noticed a bubble in the bottom left corner of the right eye. Appellant further explained that he had a "miserable cold" at the time which he believed caused the vision problem, and that he contacted his wife to obtain an appointment with his family physician upon his return to Ohio. Appellant indicated that he was a lead person for the Air Force at the conference and therefore did not believe he could leave without negatively impacting the whole conference.

Appellant was first seen by his family physician, Dr. L.M. Guirnalda, a general practitioner, on September 28, 1984. Appellant was referred to Dr. Thomas M. File, an ophthalmologist, for examination on October 1, 1984, who diagnosed retinal detachment. Appellant was then referred to Dr. Jeffrey A. Horwitz, a Board-certified ophthalmologist, on an emergency basis, on the same day. Retinal surgery was performed on October 2, 1984. Appellant submitted hospital records from St. Elizabeth's Medical Center in Dayton Ohio, which were prepared by Dr. Horwitz. The records state that appellant was admitted to the hospital on October 1, 1984 and underwent surgical correction for "retinal detachment of the right eye with a maccula detached" on October 2, 1984. Appellant was discharged on October 4, 1984.

On February 6, 1987, the Office wrote to appellant inquiring whether adequate medical facilities were available in the area of his temporary duty assignment, Los Angeles, and requesting an explanation why he had not sought immediate medical attention in that area. The Office also requested that appellant provide a statement detailing how his regular duties may have aggravated the eye condition, with supporting medical evidence.

On April 3, 1987, appellant responded to the Office advising that since the conference was held in the Los Angeles metropolitan area he assumed adequate medical facilities were available to him. In explanation of his failure to seek immediate medical attention, appellant stated:

> "I was on official government orders, as the Air Force spokesman for software management requirements, attending a software preliminary design review, at Hughes Aircraft Company, Los Angeles, California when my retina detachment started on Wednesday 9/26/84. Because I was in the process of establishing precedent setting software management requirements with our prime contractor and one of the major subcontractors which would be a model for other contractor efforts, I was heavily occupied with establishing proper implementing practices. This involvement in addition to being on a business trip in another strange part of the country caused me to not receive the prompt medical attention I would have received if I was at home. If I had been at home and not on a business trip (TDY), even with my thoughts that my eye problem was related to my severe cold, I would have seen a retina specialist within the first day after observing my eye problem on the morning of 9/26/84."

Appellant also noted in his statement, however, that he could have taken an earlier flight home, but felt that he would be home soon enough and didn't realize that greater urgency was necessary due to the severity of the eye condition. Appellant further indicated that the Los Angeles area was unfamiliar and he preferred to await treatment by his family physician and specialists recommended by his family physician.

On April 10, 1987, the Office received further reports from Dr. Guirnalda and Dr. Horwitz who acknowledged that appellant's vision remained impaired and that his condition has been aggravated by the delay in obtaining medical treatment.

The Office on April 17, 1987 requested that appellant provide further comment detailing the relationship between his regular employment duties and his eye condition. On April 30, 1987, appellant responded:

> "My employment duties contributed to my right eye condition by causing the five day delay before surgery which resulted in my having vision problems as I have previously described in earlier correspondence. My claim is not based on how my other employment duties performed on a regular basis may have contributed to my right eye condition. My claim states that the delay (in obtaining medical treatment) allowed the maccula portion of the retina to become detached which permanently impaired my vision."

The Office on June 22, 1987 submitted the case to an Office medical adviser to address: (1) Did Claimant's travel assignment carry him to a remote place, where adequate medical care for his eye problem was not available? (2) In your opinion, could the claimant have received prompt competent medical treatment while on official travel duty in Los Angeles, California?

On June 23, 1987, the medical adviser responded:

> "The [claimant] who lives in Dayton was in Los Angeles on a job assignment when he developed retinal detachment. While there are undoubtedly surgeons in Los Angeles capable of taking care of such a situation I believe the overall situation did cause a delay in the proper treatment and worsened the outcome."

By letter compensation order dated September 14, 1987, the Office denied appellant's claim finding that his eye condition did not constitute an injury within the performance of duty under the Federal Employees' Compensation Act.

The Board finds that appellant's right eye condition is not causally related to factors of his federal employment.

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that his condition is causally related to factors of his federal employment. Where an employee is on a temporary duty assignment away from his regular place of employment, he is covered by the Federal Employees' Compensation Act 24-hours a day with respect to any injury that results from activities essential or incidental to his temporary assignment.[1] However, the fact that an employee is on a special mission or in travel status during the time a disabling condition manifests itself does not raise an inference that the condition is causally related to the incidents of the employment.[2]

In *William B. Merrill,*[3] the Board reviewed the claim of a federal employee who, on a temporary duty assignment, awoke in his motel room and discovered that the vision in his right eye was blurred, and who was later diagnosed as suffering from a central retinal artery occlusion of the right eye. The Board noted that if the eye condition had resulted from activities incidental to his employment, the injury would have been compensable even though it occurred at night in his motel room. However, the evidence of record established that the eye condition appeared spontaneously during appellant's sleep without any apparent relation to the incidents of appellant's employment. Further, there was no medical opinion showing a causal relationship between the eye condition to the factors of appellant's employment.

In the present case, appellant's eye condition first appeared at home as spots in the eye on September 21, 1984. Thereafter, his detached retina spontaneously appeared as "a bubble in the left corner" on the morning of September 26, 1984, while appellant was on temporary duty. Appellant has not provided any medical evidence to relate the eye condition to any factor of his federal employment. Rather, appellant claims his condition is "incidental" to his employment because his temporary duty assignment caused a delay in securing proper medical treatment.

The Board has recognized that an injury is compensable if the obligations or conditions of employment create a "zone of special danger" out of which the injury arose. If an employee is sent by his employer to a place where adequate medical facilities are not available or obtainable for a condition unrelated to the employment, and as a result thereof, or because of a delay in obtaining the needed medical care, injury results, which would not have occurred had the stricken employee had normal access to proper medical care, such inadequacy of medical facilities or delay in obtaining

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[1] *Richard Michael Landry,* 39 ECAB 232 (1987).

[2] *Stanley K. Takahashi,* 35 ECAB 1065 (1984).

[3] 24 ECAB 215 (1973).

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treatment constitutes a risk incidental to the employment related travel, and any consequent disability is therefore compensable. Under such circumstances, the employment itself is said to place the stricken employee in a position of jeopardy.[4]

In *Thomas D. Wilson,*[5] a federal employee with a nonemployment-related cancer condition was stationed in Guam and claimed that his condition deteriorated due to the inadequacy of oncology facilities in Guam. The Board remanded the case for factual development pertaining to the adequacy of medical facilities in Guam, and for a finding on whether delay in providing travel status to Hawaii for medical treatment caused deterioration of his condition.

In the present case, both appellant and the Office medical adviser have stated that adequate medical facilities were available to appellant for treatment of his detached retina in the vicinity of his temporary duty assignment, Los Angeles, California. The medical adviser opined on June 23, 1987 that there were undoubtedly surgeons in Los Angeles who could have treated appellant's condition. The reason provided by appellant for not seeking immediate medical attention was a stated preference on his part to be treated by his family physician, in Ohio. Although appellant's eye condition was aggravated by the delay in obtaining treatment, appellant has not proven that his delay in obtaining treatment was due to a factor of his employment. Appellant could have obtained adequate medical treatment, without delay, at his temporary duty assignment station. Instead, he chose to postpone treatment until his return to Ohio on September 28, 1984. As such, his temporary duty assignment did not constitute a risk incidental to his employment and his resulting eye condition is not compensable.

The final decision of the Worker's Compensation Program, dated September 14, 1987, is hereby affirmed.

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[4] *Alleen M. Winters,* 16 ECAB 551 (1965).

[5] 33 ECAB 384 (1981).

In the Matter of HENRY MORENO *and* DEPARTMENT OF THE ARMY, U.S. ARMY PROVING GROUND, Yuma, Ariz.

Docket No. 88-170; Submitted on the Record;
Issued February 12, 1988

Before MICHAEL J. WALSH, GEORGE E. RIVERS, WILLIE T.C. THOMAS

The issues are: (1) whether appellant had more than an 18 percent employment-related binaural hearing loss for which he received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing before an Office hearing representative.

On April 10, 1986 appellant, then a 54-year-old artillery tester leader, filed a notice of occupational disease and claim for compensation alleging that he had sustained an additional hearing loss causally related to factors of his federal employment. The record forwarded on appeal indicates that on May 20, 1985 the Office of Workers' Compensation Programs issued appellant a schedule award for an 18 percent binaural hearing loss. The employing establishment submitted appellant's employment records which indicate that appellant worked as a civilian gunner from December 1965 until January 1982 and as an artillery tester leader from January 1982 until the present. Appellant has not stopped work.

The employing establishment also submitted appellant's medical records, including a March 24, 1986 audiogram which revealed a "significant threshold shift" when compared to a May 7, 1984 baseline audiogram, and noise exposure information which indicated that appellant was exposed to noise during his federal employment ranging from 125.9 decibels to 140.3 decibels.

On May 7, 1986 the Office referred appellant along with a statement of accepted facts, all available noise exposure information, and a copy of appellant's medical records and audiograms to Dr. Monte C. Nowak, a Board-certified otolaryngologist, for audiometric testing and otologic evaluation and a medical opinion as to whether appellant sustained additional hearing loss as a result of exposure to hazardous noise in his federal employment.

In a report dated June 2, 1986 Dr. Nowak indicated that he had examined appellant on that day, noted that his history was unchanged from his previous visit,[1] and stated:

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[1] The record indicates that appellant was referred by the Office to Dr. Nowak for a second medical opinion regarding his initial hearing loss claim in 1985.

> "On examination today, [appellant's] ears, nose, and throat were normal. An audiogram was done and I am enclosing a copy for your records. [Appellant's] responses are quite inconsistent and are very inconsistent with his speech discrimination.
>
> "I believe that some of his loss is exaggerated or on a functional basis. I think he should have an ABR [Auditory Brainstem Response] examination so that we can definitely determine his hearing level. I do not believe that what we are seeing is true level. I do believe that it is higher than what he is indicating."

Dr. Nowak included a copy of a June 2, 1986 audiogram which revealed a hearing loss in the right ear at the 500, 1,000 2,000, and 3,000 cycles per second frequencies of 85, 55, 80 and 80 decibels, respectively, and for the left ear of 80, 50, 75 and 80 decibels. Appellant's speech reception threshold for the right ear was 40 decibels and for the left ear 30 decibels. Speech discrimination scores for the right ear were 76 percent at 50 decibels and 88 percent at 65 decibels and for the left ear, 88 percent at 50 decibels.

The record indicates that the Office authorized Dr. Nowak to perform an Auditory Brainstem Response examination and, in an August 9, 1986, report Dr. Nowak reported the following results:

> "Overall, the ABR study was abnormal. It appears that [appellant's] hearing is better than he is indicating in his puretone audiograms. His ABR threshold is 30 decibels in the right ear and 40 decibels in the left ear. By contrast he runs between 60-80 decibels on his puretone averages. His speech reception threshold[s] also are 40 and 30 in the right ear and left ear, respectively, which would lead me to believe that [these were] probably his hearing levels between 30 and 40 decibels and that he does not have anywhere near a[s] severe [a] loss as is indicated on his puretone audiometric study. This delay that is noted can be prolonged because of a sensorineural hearing loss. However, a lesion such as an acoustic neurinoma [a tumor of a peripheral nerve sheath] could cause this type of problem. This would certainly not be something that is work related, but the patient should probably have a CT scan or evaluation by an outside physician to make sure he does not have something like an acoustic neurinoma."

Dr. Nowak included a copy of the August 9, 1986 Auditory Brainstem Response examination results with his report.

The case record was referred to Dr. David N. Schindler, an Office medical consultant and a Board-certified otolaryngologist, who in an October 14, 1986 report stated the following:

> "After reviewing the records, I submit that [appellant] does have a bilateral high frequency neurosensory hearing loss, and secondary acoustic trauma of noise exposure as previously noted in my letter of 4/13/85.[2] Unfortunately, [appellant] is unable or unwilling to respond to puretone thresholds at the present time. [Appellant] had an audiogram performed on 6/2/86 which reveals marked inconsistencies between the puretone thresholds and the speech reception thresholds recorded on the same date. Speech reception thresholds in the neighborhood of 30 to 40 decibels were approximately 20 to 30 dB better than the puretone thresholds recorded on that date. An ABR test was performed which does confirm that the patient is capable of hearing in the level of 30 to 40 dB. I submit that [appellant] does have evidence of obstructing.
>
> "With regard to the possible acoustic neuroma, I suggest that [appellant] return to his private physician for follow-up on a possible acoustic neuroma. Acoustic neuromas are not of occupational origin. Possible acoustic neuroma should be evaluated by his private ear, nose and throat physician."

By letter dated November 6, 1986 the Office informed appellant that the medical evidence indicated he had a "possible acoustic neuroma; that his condition should be evaluated by his private ear, nose and throat physician; that there was medical evidence that indicated that appellant was "obstructing the examination" and that in order to pursue his claim further it was necessary for him to submit a report from his treating physician discussing whether or not he had an acoustic neuroma. The Office indicated that such a report should be submitted within 30 days of the date of its letter.

The case record contains telephone memoranda which indicate that an Office claims examiner subsequently gave appellant an extension of time until January 15, 1987 in which to submit the required medical report and explained to appellant that the Office would not pay for the examination by his private physician to determine whether he had an acoustic neuroma.

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[2] Dr. Schindler also served as an Office medical consultant regarding appellant's original claim for hearing loss and in an April 13, 1985 medical report opined that appellant had sustained an employment-related 18 percent binaural neurosensory hearing loss.

In a report dated January 13, 1987 Dr. Abdul S. Lalani, a Board-certified otolaryngologist, stated that he had initially examined appellant in October of 1984 [3] and more recently, at appellant's request, on November 18, 1985. Dr. Lalani indicated that he had had obtained and reviewed a copy of Dr. Nowak's medical reports and stated that he redid the tests done by Dr. Nowak "in order to clear the doubts" about whether appellant had an acoustic neuroma. Dr. Lalani further stated:

> "The Audiometry was done in my office on November 24, 1986 [and] revealed moderate bilateral neurosensory hearing impairment slightly more marked on the left side with puretone average of 46 decibels on the left and 34 decibels on the right, impedance testing was normal, a Brainstem Audiometry done in my office revealed abnormalities in wave formations, the amplitude and latency and hence a CAT scan was ordered to check his interauditory canals and cerebellar-pontine angles. CAT scan, however, was reported within normal limits.
>
> "In my opinion since the CAT scan has been reported normal and patient's hearing has stayed essentially the same over the two year follow-up period the Brainstem abnormality reported by Dr. Nowak's office as well as my office was most likely secondary to patient's neurosensory hearing impairment rather than any other pathology like acoustic neuroma.
>
> "Patient is advised yearly otology follow up, to protect his ears from loud noise exposure as much as possible and also is advised to have hearing-aid evaluation."

Dr. Lalani included a copy of an audiogram made on November 24, 1986 with his report.

In a report dated February 26, 1987 Dr. Schindler, the Office medical consultant, once again reviewed the entire case record including Dr. Lalani's January 13, 1987 report and the November 24, 1986 audiogram and opined:

> "After reviewing the records I submit that the condition found on the examination of 11/4/86 [4] was aggravated by the condi-

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[3] Appellant was referred to Dr. Lalani by the Office in September of 1984 for an examination and evaluation pertaining to his original claim for hearing loss.

[4] There is no indication in the case record that an examination of appellant was conducted on November 4, 1986. It appears that the examination to which Dr. Schindler referred was the audiometric testing conducted at Dr. Lalani's request on November 24, 1986.

> tions of employment as described in the history above. The diagnosis is bilateral high frequency neurosensory hearing loss, left ear probably worse than right and consistent with the history of noise exposure as described in the history above."

Dr. Schindler completed an Office form CA-51 (hearing loss medical opinion) determining, based upon the hearing loss in both ears shown in the November 24, 1986 audiogram, that appellant had a 16 percent binaural hearing loss and indicated that a hearing-aid evaluation should be authorized.

By decision dated March 18, 1987 the Office informed appellant it had determined that he was exposed to hazardous noise in the performance of his federal employment and that he had sustained a permanent partial binaural hearing loss as a result of such exposure. However, the Office determined that appellant's binaural hearing loss was no greater than the 18 percent previously paid, therefore, appellant was not entitled to additional compensation for permanent partial loss of hearing under section 8107 of the Federal Employees' Compensation Act.[5]

By letters dated April 17, 1987 and April 22, 1987 appellant requested the Office to pay for the examination conducted by Dr. Lalani to determine whether appellant had an acoustic neuroma and for unspecified travel expenses.

On May 20, 1987 appellant submitted a copy of his typewritten April 17, 1987 letter upon which he had added a handwritten request for a hearing before an Office hearing representative.

By decision dated July 6, 1987 the Office denied appellant's request for a hearing. The Office indicated that because appellant's request for a hearing was received by the Office more than 30 days after the Office's March 18, 1986 decision appellant was not entitled to a hearing as a matter of right under section 8124 of the Federal Employees' Compenstion Act.[6] The Office further indicated that it had considered appellant's request and that since the matter at issue, the extent of appellant's current hearing loss, was medical in nature, appellant could submit additional medical evidence and request reconsideration of the Office's March 18, 1987 decision.

By letter dated July 24, 1987 appellant stated that he was unaware of the 30 day time limitation for requesting a hearing before an Office hearing representative and again requested the Office to pay for his examination by Dr. Lalani. In a letter to the Office dated August 5, 1987 an employing establishment compensation specialist, on behalf of appellant, stated that appellant felt the Office's November 6, 1986 letter requesting a report from his treating physician as to whether he had an acoustic neuroma was unclear regarding who was financially responsible for the cost of the examination, and that he had presumed that since the Office was requesting the report it would pay for the bill. The compensation specialist also requested the Office to explain to appellant why his claim for additional hearing loss was denied, since Dr. Lalani's report established that he did not have an acoustic neuroma.

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[5] 5 U.S.C. section 8107.

[6] 5 U.S.C. section 8124.

By letters dated August 13, 1987 and September 30, 1987 the Office explained to appellant that Dr. Nowak's services had been authorized and paid for by the Office, that travel expenses incurred by appellant for visits to Dr. Nowak would be reimbursed when appellant submitted the required information, that the Office authorized no services to be performed by Dr. Lalani and appellant had been notified that the Office would not pay for any bills or travel related to the services of Dr. Lalani; indicated that it was enclosing a copy of its March 18, 1987 decision which explained why appellant was not entitled to compensation for additional hearing loss; stated that there was no provision for waiver of the 30 day time limitation for requesting a hearing before the Office under 5 U.S.C. section 8124, and stated that the Office would not authorize annual hearing examinations but that it did authorize a hearing-aid evaluation and that if such an evaluation indicated that a hearing aid was appropriate, the Office would incur the cost.

The Board finds that the medical evidence of record establishes that appellant has no more than an 18 percent employment-related binaural hearing loss for which he received a schedule award.

The Office evaluates industrial hearing loss in accordance with the standards contained in the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (2nd ed. 1984) using the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second. The losses at each frequency are added up and averaged and the "fence" of 25 decibels is deducted since, as the *Guides* point out, losses below 25 decibels result in no impairment in the ability to hear everyday speech under everyday conditions. The remaining amount is multiplied by 1.5 to arrive at the percentage of monaural hearing loss. The binaural loss is determined by calculating the loss in each ear using the formula for monaural loss. The lesser loss is multiplied by 5, then added to the greater loss and the total is divided by 6 to arrive at the amount of the binaural hearing loss.[7] The Board has concurred in the Office's use of this standard for evaluation of hearing losses for schedule award purposes.[8]

In the instant case Dr. Schindler, the Office medical consultant, applied the above standardized procedures to the November 24, 1986 audiogram as follows: the decibel losses for the right ear at the 500, 1,000, 2,000 and 3,000 cycles per second frequencies, 30, 25, 30, and 50 decibels, were totaled at 135 decibels and divided by four to obtain the average hearing loss at those frequencies of 33.75 decibels. The average of 33.75 decibels was reduced by 25 decibels (the first 25 decibels were discounted as explained above) to equal 8.75 decibels which was multiplied by the established factor of 1.5 to compute a 13.1 percent hearing loss for the right ear. The decibel losses for the left ear at the 500, 1,000, 2,000 and 3,000 cycles per second frequencies, 45, 40, 45 and 55 decibels, were totaled at 185 decibels and divided by four to obtain the average hearing loss at those frequencies of 46.25 decibels, which was then reduced by the 25 decibel fence to equal 21.25 decibels which was then multiplied by the established factor of 1.5 to compute a 31.9 percent hearing loss for the left ear. The medical consultant then multiplied the 13.1 percent loss in the right ear (the hearing impairment of the better ear) by 5, then added it to the 31.9 percent loss in the left ear (the impairment of the poorer ear) and divided the sum by 6 to calculate appellant's binaural hearing loss at 16 percent.[9]

The schedule award provision of the Federal Employees' Compensation Act provides for compensation to employees sustaining permanent impairment from loss of use of specified members of the body.[10]

Appellant asserts on appeal that the medical evidence of record establishes that he has greater than an 18 percent permanent hearing loss. However, as explained above, the Office properly applied the approval standardized procedures for determining permanent hearing loss to the November 24, 1986 audiogram and correctly concluded appellant has no more than an 18 percent permanent binaural hearing loss.

The Board further finds that the Office properly denied appellant's request for a hearing before an Office hearing representative.

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[7] FECA Program Memorandum No. 272 (issued February 24, 1986).

[8] *Danniel C. Goings*, 37 ECAB 781 (1986).

[9] *See* American Medical Association's *Guides to the Evaluation of Permanent Impairment*, p. 154 (2nd. ed. 1984).

[10] 5 U.S.C. section 8107(c).

Section 8124(b)(1) of the Federal Employees' Compensation Act provides as follows:

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[11]

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[12] Specifically the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing,[13] when the request is made after the 30-day period for requesting a hearing,[14] and when the request is for a second hearing on the same issue.[15] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[16]

In the instant case appellant's May 20, 1987 hearing request was made more than 30 days after the date of issuance of the Office's March 18, 1987 decision hence, the Office was correct in stating in its July 6, 1987 decision that appellant was not entitled to a hearing as a matter of right. The Office informed appellant that he could submit additional medical evidence concerning the extent of his current hearing loss through the alternate appeal process, a request for reconsideration. The Office exercised its discretionary powers in denying appellant's request for a hearing, and in so doing, did not act improperly.[17]

Appellant asserts on appeal that the Office should reimburse him for the services of Dr. Lalani. Dr. Nowak, an Officer referral physician, in reports dated June 2, 1986 and August 9, 1986 indicated that he was unable to accurately assess appellant's current hearing loss because of inconsistent puretone averages and speech discrimination threshold responses. Dr. Nowak indicated he believed appellant's hearing was better than indicated by his puretone averages, but opined that the delay in appellant's puretone responses could be due either to a sensorineural hearing loss or to an acoustic neuroma. Office policy, as outlined in the Federal Employees' Compensation Act [FECA] Procedure Manual,[18] where the results of an impartial audiological evaluation and otologic testing are inadequate or there is reason to believe a claimant is "malingering," is to instruct the referral physician to make use of retesting and additional appropriate tests. In the present case, appellant was instructed by the Office to seek additional testing from his private physician. Dr. Lalani redid the tests performed by Dr. Nowak and opined that the abnormalities observed by Dr. Nowak were due to appellant's sensorineural hearing loss rather than to an acoustic neuroma. Upon retesting, Dr. Lalani was able to obtain an internally consistent audiogram, upon which the Office based its determination that appellant had no more than an 18 percent binaural hearing loss. Upon return of the case record the Office should reimburse appellant for the evaluation and testing performed by Dr. Lalani.

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[11] 5 U.S.C. section 8124(b)(1).

[12] *Johnny S. Henderson*, 34 ECAB 216 (1982).

[13] *Rudolph Bermann*, 26 ECAB 354 (1975).

[14] *Herbert C. Holley*, 33 ECAB 140 (1981).

[15] *Johnny S. Henderson*, *supra*.

[16] *See Herbert C. Holley*, *supra*.

[17] *Ella M. Garner*, 36 ECAB 238 (1984).

Appellant also asserts on appeal that the Office should authorize annual hearing examinations. The Board notes that Dr. Lalani in his January 13, 1987 report recommended that appellant be seen for yearly otologic follow-up. Upon return of the case record the Office should request an Office medical adviser to review the case record and make a determination as to whether such annual examinations should be authorized by the Office.

Appellant further asserts on appeal that he has not been reimbursed for travel expenses incurred for visits to Dr. Nowak. The Board notes that in response to the Office's September 30, 1987 letter appellant submitted a completed travel voucher claiming reimbursement for such expenses, which it appears the Office has not reviewed. Upon return of the case record, the Office should review the travel voucher and make a determination as to whether appellant is entitled to reimbursement for the claimed expenses.

The March 18, 1987 and July 6, 1987 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

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[18] Part 2—Claims, Chapter 2-806, para. 16(c)(3).

In the Matter of RICHARD W. ROBINSON *and* DEPARTMENT OF THE ARMY, FORT RICHARDSON, Alaska

Docket No. 87-1720; Submitted on the Record;
Issued February 12, 1988

Before GEORGE E. RIVERS, DAVID S. GERSON, MICHELE VON KELSCH

The issue is whether appellant has more than a 21 percent loss of use of the left arm for which he received a schedule award.

On October 6, 1984 appellant, then a 46-year-old coal unloader operator, sustained injury to his left wrist while in the performance of duty. Appellant's claim was accepted by the Office of Workers' Compensation Programs for a left wrist sprain and a stretch injury of the lower brachial plexus with internal derangement of the left wrist. The record indicates that appellant received continuation of pay for the period October 7 to 9, 1984; he returned to light duty from October 10, 1984 to January 5, 1985; worked regular duty from January 6, 1985 to February 23, 1985; was placed back on light duty on February 24, 1985 and last worked on November 10, 1985. Appellant commenced receiving compensation for temporary total disability on November 11, 1985.

By letter dated September 10, 1986 appellant requested that his claim be considered for a schedule award. He submitted the Office treatment notes of Dr. George R. Vrablik, his attending orthopedic surgeon, who opined that appellant had reached maximum medical improvement with a 45 percent impairment of the left upper extremity and a 27 percent impairment of the whole man. Dr. Vrablik did not provide any findings with regard to the range of motion of appellant's left upper extremity but noted that appellant had decreased strength in the left nondominant hand with a decreased ulnar sensation.

On November 14, 1986 the Office referred appellant to Dr. Scott Emery, a neurologist, who had examined appellant in conjunction with Dr. Vrablik. In a report dated December 8, 1986, Dr. Emery stated:

> "Per your request, Mr. Robinson was reevaluated today. In answer to your specific questions: Active range of motion at the elbow is full to both flexion and extension. At the wrist, radial deviation is 30 degrees, ulnar deviation is 30 degrees, dorsiflexion is 60 degrees, and palmar flexion is 85 degrees. In

> the thumb, interphalangeal [IP] joint active flexion is 80 degrees, metacarpophalangeal [MCP] joint flexion is 45 degrees, carpometacarpal [CMC] joint flexion is 30 degrees and extension is 30 degrees. Measurements in the second through fifth digits are identical, with distal interphalangeal [DIP] joint flexion of 60 degrees, proximal interphalangeal [PIP] joint flexion of 90 degrees, and metacarpophalangeal [MCP] joint flexion of 85 degrees."

Dr. Emery noted that there was no atrophy nor fasciculations apparent in the thenar or hypothenar muscles and that sensation was decreased to pinprick over the fifth digit and the ulnar half of the fourth digit. He also noted that nerve conduction in the left median nerve was tested and was consistent with prior testing which indicated local distal ulnar neuropathy of the C-8 innervated musculature.

Based on an Office medical adviser's review of the medical evidence on March 19, 1987, the Office issued a schedule award on April 30, 1987 for a 21 percent loss of use of the left arm. The period of the award ran from December 8, 1986 (the date of Dr. Emery's report) to March 10, 1988.

The Board finds that the case is not in posture for decision.

For consistent results and to insure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A. *Guides to the Evaluation of Permanent Impairment* has been adopted by the Office as a standard for evaluating schedule losses, and the Board has concurred in such adoption.[1]

In attempting to apply the standards of the A.M.A. *Guides* to the clinical findings reported by Dr. Emery, the Office medical adviser did not accurately calculate the extent of impairment to appellant's left upper extremity.

With regard to appellant's left elbow, Dr. Emery did not find any permanent impairment. At the wrist, radial deviation was reported as 30 degrees; ulnar deviation as 30 degrees; dorsiflexion as 60 degrees; and palmar flexion 85 degrees. The Office medical adviser properly determined that appellant had no impairment of the left wrist as radial deviation to 20 degrees; ulnar deviation to 30 degrees; dorsiflexion to 60 degrees; and palmar flexion 70 degrees constitute normal ranges of motion without any impairment of the wrist.

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[1] *See Peter D. Eaton*, 36 ECAB 179 (1984).

In the thumb, Dr. Emery found IP joint active flexion of 80 degrees; MCP joint flexion of 45 degrees; CMC joint flexion of 30 degrees and CMC extension of 30 degrees. The Office medical adviser found that appellant had no impairment of the thumb applying these measurements to the *Guides*; however, the Board notes that 45 degrees active MCP joint flexion would constitute a 14 percent impairment of the thumb which was not taken into consideration by the medical adviser.

With regard to the impairment contributed by the second through fifth digits to appellant's left hand, Dr. Emery found that each digit demonstrated 60 degrees DIP flexion, 90 degrees PIP flexion, and 85 degrees MCP flexion. The *Guides* provide that 60 degrees active DIP flexion of any finger constitutes six percent impairment; 90 degrees active PIP flexion constitutes six percent impairment; and 85 degrees active MCP flexion equals three percent impairment. The Office medical adviser properly calculated these values and utilized the combined values chart to determine that the contribution of multiple joint impairment to each finger equalled 15 percent impairment of each finger. The Board notes, however, that in applying Table Eight of the *Guides* to determine the extent of impairment contributed by each finger to the hand, the Office medical adviser miscalculated the impairment contributed by the index and middle fingers. The Board notes that 15 percent impairment of the index finger amounts to four percent impairment of the hand (the medical adviser found five percent) and that 15 percent impairment of the middle finger amounts to three percent impairment of the hand (the medical adviser found four percent). As a result the medical adviser found that the total impairment to the hand contributed by each finger was 12 percent. The Board finds that the actual impairment to the hand contributed by each digit, thumb included, should have been 16 percent.

The medical adviser thereafter calculated a total 21 percent impairment of the left upper extremity by combining an erroneous value (11%) for total upper extremity impairment contributed by the hand (from Table 9) with ten percent which the medical adviser granted for subjective complaints and "ill-defined residuals."

The Board notes that the report of Dr. Emery indicated that further impairment of the upper extremity existed consisting of pain and loss of sensation due to impingement of the median nerve. The Board has found that Chapter II of the A.M.A. *Guides*, The Nervous System, provides a grading scheme and procedure for determining impairment of an affected body part due to pain, discomfort, or loss of sensation.[2] For this reason, it was error on the part of the medical adviser to provide ten percent impairment for appellant's subjective complaints without applying Chapter II of the *Guides*.

The case record will be returned to the Office to properly calculate appellant's left upper extremity impairment and issue a schedule award in conformance with the *Guides*.[3] After any further development of the record it deems necessary, the Office shall issue a *de novo* decision.

The April 30, 1987 decision of the Office of Workers' Compensation Programs is set aside; the case is remanded to the Office for further development to be followed by a *de novo* decision.

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[2] *See Rozella L. Skinner*, 37 ECAB 398 (1986).

[3] The estimate of permanent impairment provided by Dr. Vrablik is of no probative value as the physician did not measure separately or record the impairment to the upper left extremity contributed by each range of motion. *See* FECA (Federal) Procedure Manual, Chapter 2-808, paragraph 7(c).

In the Matter LEONARD M. THOMPSON *and* DEPARTMENT OF THE NAVY, U.S. MARINE CORPS, Camp LeJeune, N.C.

Docket No. 87-1843; Submitted on the Record;
Issued February 12, 1988

Before MICHAEL J. WALSH, GEORGE E. RIVERS, DAVID S. GERSON

The issue is whether appellant had any disability after March 6, 1984 causally related to his September 6, 1983 employment injury.

On September 6, 1983 appellant, then a 61-year-old heavy equipment mechanic, filed a claim alleging that on that date he sustained burns to his face, throat and eyes due to fumes from an oil pit. Appellant missed work on September 8, September 21 and September 23, 1983 and received continuation of pay for that time.

On September 6, 1983 appellant was treated by an employing establishment physician who diagnosed exposure to unknown gas and reported that appellant could return to regular work on September 6, 1983. In a report dated September 8, 1983 an employing establishment physician diagnosed first degree facial burn and decreased inspiration, etiology unknown.

On October 14, 1983 the Office of Workers' Compensation Programs accepted appellant's claim for facial burn.

In a report dated January 10, 1984 Dr. Henry W. Gerock, a Board-certified family practitioner, diagnosed chronic obstructive pulmonary disease and arteriosclerotic heart disease and reported that exposure to dust and fumes aggravated his chronic obstructive pulmonary disease. Dr. Gerock noted that he instructed appellant to stay out of work from January 4 through January 20, 1984 to see if staying away from his work environment would improve his shortness of breath and pain. Dr. Gerock stated that if there was no improvement, he would recommend discontinuing appellant from his job.

On January 20, Dr. Gerock reported that as of January 23, 1984 appellant was totally disabled for his duty due to his shortness of breath and angina. Dr. Gerock reported that appellant's shortness of breath may be related to his employment.

By a letter decision dated January 26, 1984 the Office informed appellant that he was not entitled to continuation of pay from September 21, 1984 and after because his disability during that period was not shown to be due to effects of the incident on September 6, 1983.

In a report dated February 10, 1984 Dr. Gerock stated the following:

> "The diagnoses are ASHD with angina and restrictive lung disease both greatly aggravated by breathing noxious fumes of unknown etiology at work. I do not feel he can work in his usual capacity as outlined on your CA-17. He cannot be asked to perform sustained activity beyond half hour. He cannot operate heavy equipment, do constant crawling, kneeling or constant standing or carrying loads greater than 0-15 lbs. I do not feel he can work beyond three-four hours a day and this should be done in interrupted lengths of time.
>
> "I feel, of course, that he should continue under Theophylline Nitrates and to try to get on a very careful exercise program. This, in effect, will change his personal attitudes, work habits, play habits, both off and on the job. Because of his inability to perform in a usual way because of shortness of breath and chest pain. The medical condition is static at this time but exposure to your work habits, fumes and pressures will certainly aggravate these conditions. The medical basis of this is grounded in the fact that stress, inhalation of gases, dusts, and pressures on his job can certainly aggravate his heart and lung disease. I do not expect the patient to recover from his illnesses."

In a letter dated February 6, 1984 appellant requested a hearing. In a form CA-7 dated March 7, 1984 appellant claimed compensation for lost wages beginning April 20, 1984.

Appellant's hearing was held on May 9, 1984 and he submitted a May 11, 1984 report of Dr. Gerock which stated the following: "I believe that the exposure to the unknown petroleum products on September 6, 1983 certainly aggravated if not caused Mr. Leonard Thompson's lung problem."

In a decision dated July 17, 1984 an Office hearing representative set aside the January 26, 1984 decision and remanded the case to the Office. The hearing representative stated that while Dr. Gerock's reports were insufficient to discharge appellant's burden of proof, they were the only medical evidence on file and provided support for appellant's contentions. The hearing representative stated that the Office should prepare a detailed statement of facts and submit it together with the case record to one of its medical advisers or to an appropriate physician for an opinion on whether appellant's pulmonary condition was related to his employment by way of causation or aggravation.

On December 31, 1984 an Office medical adviser reviewed the case record and stated the following:

> "The single episode incident of September 6, 1983 is not felt to have caused a pulmonary disorder or adversely effected a previously existing pulmonary condition.
>
> "Patient is alleged to have COPD, but there is, indeed, no convincing evidence of that in his records. The attending physician thus notes that pulmonary function studies disclosed a 'mild restrictive defect.' If additional testing should actually show COPD, it is likely to be the result of other factors, such as smoking one and a half packs of cigarettes daily between 1942 and 1970. Patient has a remote past history of pulmonary blastomycosis but that was noted to have been treated and 'cured'.
>
> "The incident of September 6, 1983 did not cause or effect a coronary condition. Any such condition is more likely the result of genetic factors, smoking, diet, hypertension, possibly life style and other as yet undefined factors."

In a letter dated February 1, 1985 appellant was referred to Dr. John R. Baggett to determine whether appellant suffered a coronary condition as a result of the September 6, 1983 injury. Dr. Baggett referred appellant to Dr. William B. Hunt, Board-certified in pulmonary diseases, who stated the following in a report dated March 29, 1985:

> "[Appellant's] current problems began when he was exposed to fumes released when an oil slick was disturbed over a chemical dump on the base. A large number of chemicals of various unknown natures have been dumped in this area over a period of time. A colorless fume escaped when the surface was disturbed where he was and he received facial burns, 1st degree, documented in the Emergency Room and had an inability to take a deep breath with marked shortness of breath. He was seen in the Emergency Room on the base and blood gases were said to be drawn but I cannot find a record of these. This was on September 5, 1983. He was seen as a follow-up on September 8, 1983, in the base Emergency Room where he again complained of an inability to take a deep breath. Blood gases were supposedly repeated at that time but again there is no record in the folder that I have access to. He continued to have dyspnea on exertion and at rest and was seen by Dr. Gerock in Jacksonville on September 21, 1983, pulmonary function tests were done at that time but again, I have no record of this before me.
>
> "Since that time, he has been unable to do any of the exertion associated with his usual job and is dyspneic with the day to day walking and of sedentary daily activities.
>
> "A number of chest x-rays have been obtained but none of them were done in our x-ray department and I have not seen the other films.
>
> "Mr. Thompson was a three pack a day cigarette smoker until he quit ten years ago. He has had two episodes of shortness of breath lasting several weeks following a respiratory infection, one in 1970 and one in 1982. These are documented in the records. Because of persistence of his dyspnea he had pulmonary function tests done on July 20, 1982. No blood gases were done at that time.
>
> "We did pulmonary function tests today, a copy of which is enclosed, they show that since 1982, his FVC has reduced from 2.89 to 2.23, his FEV1 from 2.15 to 1.53, his FEF 25–75 from 1.60 to 0.91 and his MVV from 92 liters per minute to 67 liters per minute.
>
> "This represents a significant increase in his airway obstruction since 7/20/82. He also demonstrates a significant increase in his airway obstruction following Bronchodilator drugs ad-

> ministered today. Blood gases and his CoDiffusion were within normal limits.
>
> "His pulmonary tests in 1982 and those done now suggest progressive bronchitis.
>
> "Obviously since there were no pulmonary function tests done just prior to his exposure to the toxic fumes, I cannot say that this exposure did not produce a chemical bronchitis which is resulted in worsening of his pulmonary function tests. The normal CoDiffusion does not indicate emphysema.
>
> "The most rational interpretation of the events would suggest that he does indeed have a chemical bronchitis superimposed on his chronic bronchitis of cigarette smoking. Evidence would suggest a definite worsening in his ventilatory function since his exposure to the fumes on base."

The Office referred appellant to Dr. John R. Baggett, Board-certified in internal medicine. In a report dated April 4, 1985 Dr. Baggett stated that a treadmill stress test was normal and that appellant was able to complete stage II of the Bruce Protocol with no chest pain. Dr. Baggett answered the following to questions posed by the Office:

> "What is the established diagnosis of Mr. Thompson's coronary condition on or after January 4, 1984? I can certainly not make any diagnosis of coronary disease on Mr. Thompson. I do not have the advantage of having his previous treadmill stress test but think that if he did have a positive test that it was likely a false positive test. He certainly has a normal examination today as well as a very normal treadmill stress test. The other two questions can be answered only if we assume that Mr. Thompson does have arteriosclerotic heart disease. I was asked to complete an OWCP-5 form with this regard and will not fill this out at this time as Mr. Thompson in my opinion does not have any coronary disease. Obviously there are great limitations put on him by his pulmonary disease but this has been answered in the past and I was not asked to address these problems. I got the pulmonary function studies to assure myself that Mr. Thompson was not hypoxemic or had any pulmonary problem that would adversely be effected by a treadmill stress test."

On April 19, 1985 the Office referred appellant to Dr. William F. Credle, Board-certified in pulmonary diseases. In a report dated

May 21, 1985 Dr. Credle stated that several tests were conducted including blood gases, pulmonary function, treadmill tests and exercise testing. Based on the results of his examination, Dr. Credle concluded that appellant did not have significant obstructive lung disease. Dr. Credle also stated the following:

> "It cannot be determined with certainty whether or not the employment factors on 9/06/83 were either a cause or an aggravating factor of his pulmonary condition with absolute certainty. The type of exposure which he had, however, would be expected to cause or aggravate a bronchial condition, i.e. be a factor in obstructive lung disease. It is likely based on his history that he did have a bronchitis following his accident of 9/6/83. While it is possible that he sustained a pulmonary injury that might have resulted in a degree of restrictive disease, this is less likely.
>
> "I would suggest that employment factors on September 6, 1983 caused a bronchitis which was a temporary condition. The possibility that he may have sustained injury that caused his restrictive lung disease again is possible, but not certain."

On August 27, 1985 an Office medical adviser reviewed the case record and agreed with Dr. Credle's conclusion. Additionally, the Office medical adviser stated that Dr. Credle should be asked when the temporary aggravation of the bronchitis ceased.

In a report dated September 17, 1985 Dr. Credle stated the following:

> "In reply to your letter of September 3, 1985, I have reviewed all records which I have available with regards to Mr. Thompson. As I am sure you can appreciate, it is very difficult to determine when he would have been recovered from his industrial exposure. Basically, it still remains my opinion that he could well have sustained an acute bronchitis type problem and I have seen situations where this has lingered on, causing problems for several months. Thus, based on past experience, it may not be unrealistic to suppose that he might have been having trouble for three to six months, but I cannot imagine a longer period of aggravation. Again, this is speculative and the best I can do is make the statement which I have made here."

On October 16, 1985 the Office medical adviser reviewed the case record and agreed with a six month period of temporary aggravation based on Dr. Credle's September 17, 1985 report. The Office medical adviser stated that appellant's aggravation should have ended March 6, 1984.

By compensation order dated November 12, 1985 the Office denied appellant's claim on the ground that the weight of the medical evidence established that the September 6, 1983 injury caused a temporary obstructive lung condition in the nature of bronchitis that resulted in disability to perform regular duty through March 6, 1984.

In a letter dated January 8, 1986 appellant requested a hearing which was denied on May 20, 1986 since appellant's request was not made within 30 days.

In a letter dated July 2, 1986 appellant requested reconsideration and submitted the June 6, 1986 report of Dr. Hunt. In his report Dr. Hunt stated the following:

> "My opinion is that Mr. Thompson had mild obstructive pulmonary disease documented in 1982 by pulmonary function tests. After an exposure to unknown chemical fumes in 1983, he had documented worsening of his pulmonary function tests going from mild to moderately severe. I think the evidence would suggest that this was a direct result of the chemical fume exposure. Since that time, he has had some general improvement in his pulmonary function and arterial blood gas studies, but he . . . [has] still not recovered his pulmonary function to the point it was in 1982 documented on the pulmonary function tests before the chemical fume exposure."

In a letter dated August 27, 1986 the Office informed appellant that the May 20, 1986 decision denying appellant's hearing had been affirmed.

In a memorandum dated October 24, 1986 the Office stated that appellant's claim had been referred to another claims examiner in accordance with procedures for reconsideration requests.

Appellant submitted the October 9, 1986 report of Dr. Hunt which stated the following:

> "I am enclosing a copy of my June 19, 1986 work-up of Leonard Thompson concerning his 1983 exposure to chemicals and the result of this exposure as far as his pulmonary disease is concerned. As the summary states, he had been a three pack a day cigarette smoker, but had quit in 1973. I am also enclosing a copy of my initial work-up of March 29, 1985, which details his description of the chemical exposure.

> "The important data upon which I based my opinions about his disease are a set of Pulmonary Function Tests, one done prior to his chemical exposure on July 20, 1982 and another on September 23, 1983, following his exposure to the chemical fumes. He was exposed on September 6, 1983 and was in a great deal of distress and finally with continuing difficulty he was examined in the laboratory of Dr. Terrence Wolanski at the Onslow Memorial Hospital in Jacksonville.
>
> "His FEV1 was reduced from 2.15 to 1.85 and his FEF 25-75 had remained essentially the same at 1.61. His MVV however had dropped from 92 to 80.
>
> "What is perhaps just as important is that this reduction in Pulmonary Function continued rapidly so that by the time his pulmonary function tests were done in March of 1985 his FEV1 had continued to drop to 1.53, his FEF 2-75 was remarkably reduced to 0.91 and his MVV had continued to fall to 64 liters per minute. These last mentioned studies were those accomplished in March of 1985. At the time of those studies it was apparent that his Forced Vital Capacity had dropped from 2.89 in 1982, to 2.25 in March of 1985.
>
> "It is my opinion that this all represents a much more rapid deterioration in pulmonary function than one would ever expect from a man who had stopped smoking and whose documented pulmonary functions were only moderately reduced in July of 1982 one year prior to his chemical exposure.
>
> "Pulmonary function studies done in June of 1986 did show a slight improvement over those done in March of 1985, however, they were not improved to the point documented in 1982 before the chemical exposure.
>
> "Both his clinical condition (his ability to exercise) and his pulmonary function tests suggest to me acute and chronic lung damage from the time of his exposure to chemical fumes in 1983."

On November 17, 1986 an Office medical adviser reviewed the case record and concluded that prior to making a determination of permanent disability he would like to have the complete pulmonary function studies of July 19, 1982, September 1983, March 1985 and June 1986.

On June 4, 1987 an Office medical adviser reviewed the case record and stated that there did not appear to be a significant permanent change and that Dr. Hunt did not support appellant's claim with rationalized medical evidence. The medical adviser concluded that there was not any evidence that appellant's condition was totally disabling and that "the MVV of 80 L/Min. obtained on June 6, 1986 is compatible with performance of substantial physical activity."

In a second report dated June 4, 1987 the Office medical adviser stated the following:

> "Dr. Credle has already opined that the aggravation was temporary in his letter 9/17/85. However, Dr. Hunt feels the aggravation was permanent based on pulmonary function tests, letter of October 9, 1986.
>
> "First, decreased pulmonary function tests taken at face value can be misleading since they require full patient effort or cooperation. The values of June 6, 1986 (the ones Dr. Hunt is largely basing his opinion of permanent aggravation) strongly suggests that claimant did not consistently put forth full efforts e.g., the FEV1 of 1.67 is disproportionately low (it should roughly equal the MVV of 80 if multiplied by factor of 40 and it does not). If one takes the MVV values alone of 92 L/Min. on July 20, 1982 and 80 L/min on June 6, 1986, there has been no significant change. This degree of variation (approximately 13 percent decrease) is easily explained by factors inherent in the system and age changes."

By compensation order dated August 6, 1987 the Office denied modification of the prior order on the ground that the evidence submitted was insufficient to warrant modification. The Office stated that the June 6, 1986 report of Dr. Hunt was not significantly different than his opinion as addressed in the November 12, 1985 Office decision. The Office concluded that Dr. Hunt's June 6, 1986 report was repetitious and cumulative and therefore lacked the necessary probative value to warrant a modification of the prior decision.

The Board finds that there is a conflict of medical opinion on whether appellant's employment caused a permanent or temporary aggravation of appellant's condition.

Dr. Credle, Board-certified in pulmonary disease, reported on May 21, 1985 that employment factors on September 6, 1983 caused a temporary aggravation of appellant's bronchitis. He also stated in his September 17, 1983 report that "it may not be unrealistic to suppose that [appellant] has been having trouble for three to six months, but I cannot imagine a longer period of aggravation."

Dr. Hunt, Board-certified in pulmonary disease, reported on October 9, 1986 that "both his clinical condition and his pulmonary function tests suggest to me acute and chronic lung damage from the time of his exposure to chemical fumes in 1983." Dr. Hunt was originally a referral physician, being referred by Dr. Bagget, also a referral physician. However, appellant continued to be treated by Dr. Hunt following the original referral examination and submitted two of his reports upon reconsideration. Appellant's representative referred to Dr. Hunt as "our doctor" and an Office medical adviser referred to him as a "treating" physician. These facts are sufficient to consider Dr. Hunt as appellant's attending physician and, therefore, as appellant's attending physician his October 9, 1986 report created a conflict of medical opinion with that of Dr. Credle.

To resolve the conflict of medical opinion noted above, the Office should, pursuant to section 8123(a) of the Federal Employees' Compensation Act,[1] refer appellant, the case record and a statement of accepted facts to an appropriate medical specialist for a reasoned opinion as to whether appellant's employment caused a permanent or temporary aggravation of appellant's condition. After such further development as it deems necessary, the Office shall issue a *de novo* decision.

The decisions of the Office of Workers' Compensation Programs dated August 27, 1986 and August 6, 1987 are set aside and the case is remanded to the Office for further action consistent with this decision of the Board.

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[1] 5 U.S.C. section 8123(a) states in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

In the Matter of MARK C. HOLST *and* U.S. POSTAL SERVICE, ST. LOUIS BULK MAIL CENTER, Hazelwood, Mo.

Docket No. 87-939; Submitted on the Record;
Issued February 16, 1988

Before GEORGE E. RIVERS, DAVID S. GERSON, MICHELE VON KELSCH

The issue is whether appellant has established that he sustained injuries in the performance of duty on June 26, 1986.

On June 27, 1986 appellant, then a 35-year-old mail handler, filed a claim for injuries to his left shoulder and hand which he allegedly sustained on June 26, 1986 when he was struck by an over-the-road container while he was entering the employing establishment premises for the purpose of picking up his paycheck. Appellant stopped work on June 27, 1986 and was examined by Dr. Lawrence J. Billy, a general surgeon, who diagnosed tendinitis of the left hand and indicated that appellant could return to limited duty on June 30, 1986.

In response to an Office of Workers' Compensation Programs inquiry, the employing establishment indicated that on June 26, 1986 appellant was not scheduled to work and not in a pay status. In a letter dated July 1, 1986 the employing establishment further indicated that on pay days all "employees that are nonscheduled or on leave wishing to pick up their paychecks during that time, must go to their assigned work area and pick up check from the supervisor in charge on that day."

By compensation order dated July 22, 1986 the Office rejected appellant's claim on the ground that since appellant was not working at the time of the accident, but only picking up his paycheck, he was not in the performance of duty.

On August 18, 1986 appellant requested a hearing before an Office hearing representative. At the December 17, 1986 hearing appellant stated that it was routine procedure for employees who were not scheduled to work on pay days to go into the employing establishment on those days and pick up their paychecks. Appellant further indicated that employees were not required by the employing establishment to go in and pick up their paychecks and that had he not gone in on June 26, 1986 he would have received his paycheck the next day when he was scheduled to work. Subsequent to the hearing appellant submitted medical records pertaining to treatment of the hand injury he sustained on June 26, 1986.

In a decision dated February 20, 1987 and finalized February 24, 1987 the hearing representative affirmed the Office's July 22, 1986 decision and found that since appellant's purpose for being on the employing establishment premises on June 26, 1986 was for a personal reason, he was not in the performance of duty.

The Board finds that appellant has not established that his injuries on June 26, 1986 were sustained in the performance of duty.

The phrase "while in the performance of duty" in the Federal Employees' Compensation Act has been construed by the Board as consistent with the phrase "arising out of and in the course of employment" commonly found in workers' compensation.[1] "In the course of employment" deals essentially with the work setting, the locale, and the time of the injury whereas "arising out of the employment" encompasses not only the work setting but also a causal concept, the requirement being that an employment factor caused the injury.[2]

The "course of employment" for an employee having a fixed time and place of work, embraces a reasonable time interval before official working hours while the employee is on the premises engaged in preparatory or incidental acts.[3] Although the injury here occurred on the employment premises, it did not occur during appellant's regular work shift as a regular incident of employment. Nor did the injury occur within a reasonable time period before or after the work shift. Therefore, some substantial employer benefit or requirement must be shown to consider the activity involved to be arising out of the employment.[4] Under the circumstances of this case, there was no requirement that appellant return to the employment premises on a day he was not scheduled to work to pick up his paycheck. Appellant testified that he would have received his paycheck the next day when he was scheduled to work. Furthermore, appellant has not shown that returning to the employment premises on his day off provided any substantial employer benefit. Accordingly, the Board concludes that appellant was not fulfilling the duties of his employment at the time of his injury and was not in the performance of duty.[5]

The decisions of the Office of Workers' Compensation Programs dated July 22, 1986 and February 24, 1987 are hereby affirmed.

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[1] *Norton Edward Joseph*, 26 ECAB 134 (1974).

[2] *Dennis F. Rafferty*, 16 ECAB 413 (1965).

[3] *Larson, Workmen's Compensation Law*, section 21.60.

[4] *Larson, Workmen's Compensation Law*, section 22.00. *See Kathleen Lichtenberger*, Docket No. 83-969 (issued July 2, 1984); *Clayton Varner* 37 ECAB 248 (1985).

[5] *Cornelia Denham*, Docket No. 85-1882, (issued August 21, 1986).

In the Matter of JAMES H. WOODS, son of JAMES B. WOODS, deceased *and* DEPARTMENT OF THE NAVY, NAVAL SHIPYARD, Philadelphia, Pa.

Docket No. 87-1086; Submitted on the Record;
Issued February 17, 1988

Before GEORGE E. RIVERS, DAVID S. GERSON, MICHELE VON KELSCH

The issue is whether appellant has established that he is entitled to death benefits on the basis that he is incapable of supporting himself pursuant to 5 U.S.C. section 8133.

At the time of his death the employee was receiving compensation for temporary total disability due to a work-related condition of "pulmonary emphysema, obstructive lung disease and pulmonary fibrosis." The Office of Workers' Compensation Programs subsequently accepted that the employee's work-related condition was the primary cause of his death on March 12, 1986. By decision dated June 10, 1986 the Office determined that the employee's wife was entitled to death benefits.

Appellant, the employee's son, also filed a claim for compensation alleging that he is incapable of self-support. In support of his claim appellant submitted a September 13, 1977 letter from the Social Security Administration awarding appellant benefits for disability. The letter does not indicate the nature of appellant's disability. Appellant also submitted two medical reports. In a report dated January 19, 1983 Dr. Craig Purcell, a physician, stated that he examined appellant on January 6, 1983 and diagnosed "arthritis of the left talocalcaneal joint possibly traumatic in origin with peripheral sensory deficit." He noted that appellant "certainly is unable to perform any tasks requiring walking, stooping, bending or any type of use of the left leg." The doctor did not indicate whether these limitations were permanent or not.

Appellant also submitted the report of a July 6, 1983 psychiatric evaluation by Dr. Donald Crider, a Board-certified psychiatrist. Dr. Crider diagnosed "DSM III . . . social phobia, paranoid personality disorder, status post-comminuted fracture left heel and ankle with poor healing, and concomitant pain syndrome." The doctor noted that appellant was at that time, a college student majoring in psychology and "capable of managing his own benefits."

On May 15, 1986 a District Medical Director reviewed the medical reports submitted by appellant and opined that appellant had neither total physical disability nor total mental disability and noted that he was only "partially impaired."

By compensation order dated March 3, 1987 the Office rejected appellant's claim on the ground that he did not establish that he is incapable of self-support.

The Board finds that appellant has not established that he is incapable of self-support pursuant to section 8133 of the Federal Employees' Compensation Act.

Sections 8133 (a)(2) and (b)(2) allow for death benefits to a surviving child of an employee whose death resulted from a work-related injury, if the child is under 18 years of age, or if over 18 and incapable of self-support.[1]

The record indicates that appellant is currently 43 years old and unemployed. Appellant alleged that he is incapable of supporting himself and on appeal indicates that this is due to mental incompetency. However, the medical evidence of record does not support that appellant is mentally incompetent or that he is physically totally disabled. The medical evidence consists of two medical reports from Drs. Crider and Purcell. Dr. Crider performed a psychiatric evaluation on appellant. He concluded that although appellant had "social phobia" and "paranoid personality disorder" he was "capable of managing his own benefits." Dr. Purcell examined appellant for a left foot condition. Dr. Purcell diagnosed "arthritis of the left talocalcaneal joint . . . with peripheral sensory deficit" and indicated that due to this condition appellant had limited movement in his left knee and left ankle.

The Board finds the two reports insufficient to establish that appellant is either mentally or physically totally disabled. The reports only address appellant's mental and physical condition in 1983. He has not submitted any medical evidence showing that he is currently mentally incompetent or physically totally disabled. Nor has anyone submitted such evidence on behalf of appellant. The Board further notes that appellant was appointed executor of the employee's estate and managed the claim for death benefits on behalf of the employee's widow. Therefore, since there is no evidence of record showing that appellant is incapable of self-support and there is evidence that he is currently mentally capable, the Board finds that it has not been established that he is entitled to death benefits.

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[1] 5 U.S.C. sections 8133 (a) and (b).

The decision of the Office of Workers' Compensation Programs dated March 3, 1987 is hereby affirmed.

In the Matter of JAMES G. LOCKE *and* DEPARTMENT OF THE AIR FORCE, LOGISTICS COMMAND, TINKER AIR FORCE BASE, Okla.

Docket No. 88-159; Submitted on the Record;
Issued February 18, 1988

Before GEORGE E. RIVERS, DAVID S. GERSON, MICHELE VON KELSCH

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant was not without fault with respect to an overpayment of compensation in the amount of $2,798.53, received during the period October 9, 1984 through January 2, 1985, and therefore the overpayment was not subject to a waiver.

On May 28, 1983 appellant, then a 57-year-old federal government worker, filed a claim for compensation alleging that he sustained injuries to his face, chest, and back on May 19, 1983 when a co-worker struck him with a steel pipe.[1] Appellant stopped work on May 19, 1983, and has not returned.

Following the attack appellant was taken to the emergency room of St. Anthony's Hospital, where he was admitted with the diagnosis of multiple injuries including fracture of C7, a fractured right mandible, and a pulmonary contusion. On May 25, 1983 appellant underwent posterior decompression laminectomy at C7 and foraminotomy of C7 and C6 on the right with posterior wiring and fusion with an iliac bone graft from T1 to C6. Appellant was discharged from the hospital on June 2, 1983.

On July 22, 1983 the Office of Workers' Compensation Programs accepted appellant's claim for herniated nucleus pulposus, C6, C7, multiple abrasions and contusions. Appellant received continuation of pay for the period May 20 through July 3, 1983, and then received temporary total disability compensation benefits.

By form letter CA-1049 dated February 14, 1984 the Office informed appellant that he was placed on the periodic rolls effective January 26, 1984. The letter explained that appellant needed to inform the Office immediately when he returned to work, in order to avoid an overpayment of compensation. Furthermore, appellant needed to return to the Office any compensation checks he received after returning to work.

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[1] Appellant did not bring a third party action against the co-worker who attacked him.

By letter dated October 16, 1984 the Office informed appellant that medical evidence established that he was no longer totally disabled. The Office concluded that he was able to perform the duties of a clerk, and offered appellant the position. Appellant declined to accept the position of clerk, and stated that he "preferred to retire." He elected to "return to work" and use sick leave effective October 29, 1984, until he was able to retire on January 3, 1985.

By compensation order dated March 5, 1985 the Office rejected appellant's claim for continuing compensation on the grounds that section 8106(c)(2) of the Federal Employees' Compensation Act precluded appellant from receiving compensation since he refused suitable employment.

By compensation order dated July 26, 1985 the Director of the Office vacated the March 5, 1985 order on the grounds that the Office failed to advise appellant of the provisions of section 8106(c)(2) and of the possible repercussions of refusing a job offer. Appellant's compensation was reinstated effective October 29, 1984.

By letter dated July 30, 1985 the Office informed appellant that his compensation benefits for temporary total disability were reinstated effective October 29, 1984. The Office informed appellant that he could not receive benefits of the U. S. Civil Service Retirement Act for the same period of time he was receiving benefits under the Act, and that he needed to elect the benefits which were most advantageous to him. Appellant elected to receive benefits under the Act.

On December 20, 1985 the Office issued appellant a check in the amount of $5,576.35 which stated: "Compensation from 10/29/84 to 9/30/85."

By letter dated March 12, 1986 the Office informed appellant that medical evidence indicated that he was no longer totally disabled, and that he could perform the duties of clerk. The Office explained that failure to accept the position could result in a reduction or discontinuance of compensation benefits. By letter dated March 24, 1986 the Office informed appellant of the provisions of 5 U.S.C. section 8106(c) which provide: "a partially disabled employee who (1) refuses to seek suitable work; or (2) refuses or neglects to work after suitable work is offered to, procured, by, or secured for him; is not entitled to compensation." By letter dated April 9, 1986 appellant declined to accept the position of clerk.

By compensation order dated June 5, 1986 the Office rejected appellant's claim on the grounds that section 8106(c)(2) of the Act precluded appellant from receiving compensation since he refused suitable employment. Appellant's benefits ceased as of June 7, 1986.

By letter dated September 2, 1986 appellant requested reconsideration of the June 5, 1986 decision.

By compensation order dated November 13, 1986 the Office denied appellant's application for review on the grounds that his application was *prima facie* insufficient to warrant review.

By letter decision dated April 17, 1987 the Office informed appellant that a preliminary determination had been made, that appellant received an overpayment of compensation in the amount of $2,798.53. The overpayment occurred because appellant received both compensation payments and pay for sick leave during the period October 29, 1984 through January 2, 1985. A preliminary finding was made that appellant was not without fault with respect to the overpayment because he accepted payment which he knew or should have known to be incorrect. The Office enclosed an overpayment recovery questionnaire, and told appellant that it needed financial information in order to decide whether he was eligible for a waiver of overpayment, in the event that a final determination was made that he was without fault with respect to the overpayment. Appellant was informed that the questionnaire needed to be returned to the Office within 30 days.

By letter dated April 28, 1987 appellant denied that an overpayment occurred, stating that he received disability compensation from July 26, 1983 to October 27, 1984; sick leave from October 29, 1984 to January 2, 1985; and Civil Service retirement from January 4, 1985 to September 30, 1985. He stated that his disability compensation was reinstated as of January 4, 1985 and he repaid the amount of civil service retirement he received. By letter dated June 2, 1987 appellant further stated that he had no records of receiving a check prior to January 4, 1985.

Subsequent to the June 2, 1987 letter, the Office put a tracer on a check issued December 20, 1985 and discovered that appellant had received that check which included compensation for the period October 29, 1984 to January 4, 1985, and that he cashed the check.

By letter compensation order dated July 31, 1987 the Office made a final determination that appellant received an overpayment in the amount of $2,798.53, and that he was at fault with respect to the overpayment. The overpayment occurred because he received both compensation payments in the 12/30/85 check and pay for sick leave for the period October 29, 1984 through January 2, 1985. The Office also noted that a tracer had been put on the check covering the period October 29, 1984 through January 2, 1985, and that appellant had in fact signed and cashed the check. On the face of the check were the words, "Compensation from October 29, 1984 to September 30, 1985." Appellant was required to repay the overpayment within 30 days.

By letter dated August 24, 1987 appellant returned the overpayment recovery questionnaire and requested a waiver of the overpayment. In the alternative, appellant requested that he repay the overpayment in monthly installments.

By letter dated August 31, 1987 the Office explained that the July 31, 1987 decision was final, and that they would not now decide the issue of waiver. The Office informed appellant, however, that he could appeal the decision to the Board.

The Board finds that appellant received an overpayment of compensation for the period October 29, 1984 through January 2, 1985 in the amount of $2,798.53, that he was not without fault with respect to the overpayment, and that therefore the overpayment is not subject to a waiver.

The record is clear that appellant received both compensation and pay for sick leave during the period October 29, 1984 through January 2, 1985. Therefore appellant received an overpayment of compensation for that period which totalled $2,798.53. The only question thus remaining is whether appellant was at fault with respect to that overpayment, and that therefore the overpayment was not subject to a waiver.

The Federal Employees' Compensation Act, 5 U.S.C. section 8129(b), states that: "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."

In determining whether an individual is with fault, the Office will consider all pertinent circumstances, including age, intelligence, education, and physical and mental condition. An individual is with fault in the creation of an overpayment who: (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or (2) Failed to furnish information which the individual knew or should have known to be material; or (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.[2]

In the present case it is apparent that the Office applied the third standard for determining fault. Appellant accepted a payment which he knew or should have known to be incorrect. Appellant was placed on the periodic rolls for temporary total disability compensation effective January 26, 1984. At that time appellant was informed that he was not entitled to continuing compensation benefits when/if he returned to work, and that he should return any payments he received after returning to work. On October 16, 1984 the Office determined that appellant was no longer totally disabled, and could perform the duties of clerk. At that time appellant elected to waive any benefits for loss of wage-earning capacity under the Act and he "returned to work" using sick leave effective October 29, 1984 until he was able to retire on January 3, 1985. When the Office determined that appellant was once again eligible for temporary total disability compensation, appellant elected to waive any benefits he had under the Civil Service Retirement Act, and resume his benefits under the Act. By letter dated July 30, 1985 the Office informed appellant that his compensation benefits were reinstated effective October 29, 1984. When appellant received the check dated December 20, 1985 in the amount of $5,576.35, the check clearly stated: "Compensation from 10/29/84 to 9/30/85." As appellant had previously been informed that he was not entitled to any compensation benefits after returning to work, he knew or should have known that he had erroneously accepted benefits for the period October 29, 1984 through January 2, 1985 when he endorsed the December 30, 1985 check. Even though appellant was not physically at work during this time, he was reinstated in an employment status and was receiving sick leave pay, as of October 29, 1984. The Federal Employees' Compensation Act provides that an employee who receives sick leave pay may not receive compensation for the same period.[3] Therefore he knew or should have known that he was not entitled to compensation under the Act for that same period. As appellant was not without fault with respect to this overpayment, recovery of the overpayment may not be waived hereby.

The decision of the Office of Workers' Compensation Programs dated July 31, 1987 is hereby affirmed.

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[2] 20 C.F.R. section 10.320 (revised April 1, 1987).

[3] *See* 5 U.S.C. section 8116.

In the Matter of NICHOLAS A. DALO *and* DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, Philadelphia, Pa.

Docket No. 88-192; Submitted on the Record;
Issued February 19, 1988

Before MICHAEL J. WALSH, GEORGE E. RIVERS, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied appellant continuation of pay for the period November 26, 1976 through January 9, 1977 on the ground that appellant failed to give written notice within the applicable time limitation provision of the Federal Employees' Compensation Act.

On January 24, 1977, appellant, then a 56-year-old contract administrator, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that on November 25, 1976, he had an adverse reaction to a "swine flu" inoculation administered at the employing establishment on November 9, 1976 and suffered partial paralysis of his legs, loss of equilibrium and loss of hearing in his left ear. Appellant's Form CA-1 indicates that he stopped work on November 26, 1976 and returned to work on January 23, 1977.

Based on supporting medical evidence, the Office of Workers' Compensation Programs, by compensation order dated September 13, 1982, which incorporated a memorandum summarizing the evidence, accepted appellant's claim for "Guillain Barre Syndrome" and authorized payment of compensation and medical expenses for all related periods of disability. The Office found that the evidence of record indicated that appellant sustained significant hearing loss in his left ear as a result of his Guillain Barre Syndrome and recommended further examination and evaluation of appellant's loss of hearing for schedule award purposes. On March 14, 1984, the Office issued appellant a schedule award for 63 percent monaural hearing loss in the left ear, with the period of the award running from October 4, 1983 to February 22, 1984,[1] and on October 27,

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[1] By application for review filed with the Board on March 12, 1985, and docketed as No. 85-1859, appellant appealed a December 12, 1984 decision of the Office denying modification of its March 14, 1984 schedule award to appellant. In requesting modification of the March 14, 1984 decision, appellant claimed that he had sustained more than a 63 percent loss of hearing in his left ear and submitted supporting medical evidence. By order granting remand dated June 27, 1985, the Board granted the request of the Director of the Office to remand the case to enable the Office to refer appellant for an updated and complete otologic evaluation.

1986, the Office issued appellant a second schedule award for 37 percent additional monaural hearing loss in the left ear, with the period of the award running from April 26, 1986 to September 7, 1986.

By letter dated November 18, 1986, appellant requested that the Office render a decision on his claim for continuation of pay made in his January 24, 1977 notice of traumatic injury claim. By letter to the employing establishment dated April 13, 1987, with a copy to appellant, the Office authorized continuation of pay for appellant for the period November 26, 1976 to January 9, 1977. This authorization was subsequently revoked by the Office upon recognition that appellant's traumatic injury claim was filed more than 30 days after the date of the employment injury of November 9, 1976.

By letter decision dated May 13, 1987, the Office notified appellant that he was not entitled to continuation of pay for his absence from work during the period November 26, 1976 through November 9, 1977 on the basis that he failed to file his claim within the required 30-day period. The Office further notified appellant that its decision was applicable to continuation of pay only and did not affect his entitlement to other compensation benefits.

By letter dated June 11, 1987, appellant requested reconsideration of the Office's decision of May 13, 1987 and in support of his request for reconsideration submitted, *inter alia*, a photocopy of his Form CA-1 on which he lists the date of his notice as January 24, 1977 and in response to the question as to why his claim was not filed within two working days of the injury, states that "[my] sudden and severe reaction occurred 11-25-76. Examined by Dr. DeCaro 11-26-76; treated for vertigo. Telecon to my supervisor 10:00 a.m., 11-26-76. Developed symptoms of Barre Syndrome; have kept [the employing establishment] informed twice weekly." On the copy of Form CA-1 submitted by appellant, the reverse side, which is to be completed by appellant's supervisor, states that the reporting office received notice of injury on November 26, 1976. The photocopy of the Form CA-1 submitted by appellant, however, was not a copy of the form signed by the employing establishment. On the original Form CA-1 contained in the case record and signed by appellant's supervisor, the date of appellant's notice of his claim is listed as January 24, 1977 but the date of November 26, 1976, the date the reporting office allegedly received notice, has been crossed through and the word "unknown" substituted in its place and initialed by appellant's supervisor. Appellant, in his letter requesting reconsideration, stated that his "supervisor was informed within 24 hours of the event . . . by telephone. I was advised to keep the [employing establishment] informed periodically regarding the status of the injury and to complete forms upon return to work."

By compensation order dated September 8, 1987, which incorporated a memorandum summarizing the evidence, the Office reviewed appellant's case on the merits under 5 U.S.C. section 8128 and denied modification of its prior order dated May 13, 1987 on the basis that the evidence submitted by appellant in support of reconsideration was insufficient to warrant modification of the prior decision. The Office found that appellant failed to establish that he had filed notice of injury on an approved form within 30 days of the date of injury.

The Board finds that the Office of Workers' Compensation Programs properly denied appellant continuation of pay for the period November 26, 1976 through January 9, 1977 on the ground that he failed to give written notice within the applicable time limitation provision of the Federal Employees' Compensation Act.[2]

Section 8118 [3] of the Act provides for payment of continuation of pay, not to exceed 45 days, to an employee "who filed a claim for a period of wage loss due to a traumatic injury with his immediate superior on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2) [4] of this title." The latter section provides that written notice of injury shall be given "within 30 days." The context of section 8122 makes clear that this means within 30 days of the injury.[5]

Appellant contends that he informed his supervisor of his illness within 24 hours of its occurrence and that he was advised to keep the employing establishment informed periodically regarding the status of his condition.

Oral notification to the employing establishment of an employment-related injury within 30 days of the injury is not sufficient to constitute notice of injury within the statutory requirements of section 8118 of the Act. The context of this section makes clear that in order to benefit from its continuation of pay provision, an employee must file *written* notice of the injury and words of claim must be included in such notice.[6] The only document in the case record which constitutes a claim is the Form CA-1, notice of traumatic injury and claim for continuation of pay-compensation, dated and filed by appellant on January 24, 1977. As this claim was filed more than 30 days after the November 9, 1976 injury, the claim for continuation of pay is barred by the applicable time limitation provision of the Act.

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[2] 5 U.S.C. section 8101 *et seq.*

[3] 5 U.S.C. section 8118.

[4] 5 U.S.C. section 8122(a)(2).

[5] *See George A. Harrell*, 29 ECAB 338 (1978).

[6] 5 U.S.C. section 8118.

Appellant contends that his traumatic reaction to the swine flu inoculation did not occur until November 25, 1976, sixteen days after the inoculation had been administered.

The Board has held that section 8122(d)(3) of the Act, which allows the Office to excuse failure to comply with the time limitation provision for filing a claim for compensation because of "exceptional circumstances," is not applicable to section 8118(a)[7] which sets forth the filing requirements for continuation of pay.[8] There is no provision under the Act for excusing an employee's failure to file a claim for continuation of pay within 30 days of the employment injury. The fact that a claimant may be unaware that he sustained an injury on the date of an employment incident or is unaware of the severity of an injury sustained at the time of the incident until several days or weeks later is not sufficient to toll the running of the 30-day filing requirement.[9] The rationale for this finding is set forth in the *William E. Ostertag* decision of the Board.[10]

Appellant further contends that he expressed concern to his supervisor about the timely filing of the proper claim forms and was advised that the forms could be completed upon his return to work.

With respect to this contention, the Board notes that the instant case is similar to *Lois M. Townsend*[11] and *Russell P. Chambers.*[12] In each of those cases, the claimant asserted that notification of the employment injury had been provided to the official supervisor and that the official supervisor had failed to provide or submit proper notice of injury. The Board found that since written notice of injury had not been timely filed, the claimant was not entitled to continuation of pay. In keeping with the *Townsend* and *Chambers* decisions, appellant, in the instant case, is not entitled to continuation of pay because proper notice of injury on a form approved by the Secretary of Labor was not filed within 30 days of the injury.

This decision does not preclude appellant from receiving compensation, as distinguished from continuation of pay, for any disability resulting from the November 9, 1976 employment injury as the Office also pointed out to appellant in its letter decision of May 13, 1987.

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[7] 5 U.S.C. section 8118(a).

[8] 5 U.S.C. section 8122(d)(3).

[9] *See Michael R. Hrynchuk*, 35 ECAB 1094 (1984); *See also Sandra A. Sams*, Docket No. 85-1212 (issued August 14, 1985).

[10] *William E. Ostertag*, 33 ECAB 1925 (1982).

[11] 29 ECAB 470 (1978).

[12] 32 ECAB 550 (1981).

The decisions of the Office of Workers' Compensation Programs dated May 13, 1987 and September 8, 1987 are hereby affirmed.

In the Matter of ADINA D. BLANCO *and* DEPARTMENT OF THE NAVY, NAVAL SHIPYARD, Long Beach, Calif.

Docket No. 87-1813; Submitted on the Record;
Issued February 22, 1988

Before MICHAEL J. WALSH, GEORGE E. RIVERS, DAVID S. GERSON

The issue is whether appellant had any disability causally related to her employment injury of September 21, 1978 after June 8, 1985.

On September 22, 1978 appellant, then a 46-year-old mail file clerk, filed a claim for compensation alleging that on September 21, 1978 she sustained a fractured pelvic bone when she fell from a scooter while in the performance of duty. Appellant stopped work on September 22, 1978 and did not return.

Appellant sought treatment by Dr. James Roe, a Board-certified orthopedic surgeon, on the day of her injury. Dr. Roe found appellant sustained a fracture of the left superior and inferior pubic ramus and acetabulum. He indicated appellant would be totally disabled for the period of September 21, 1978 to November 21, 1978, partially disabled for a month thereafter, and able to resume regular work by December 21, 1978.

By report dated November 2, 1978 Dr. Roe indicated he had examined appellant on October 13, 1978 and October 31, 1978. On October 13, 1978 appellant complained of occasional sharp pain in her lateral pelvis which "exacerbated during the night." Dr. Roe noted appellant's progress was good and advised continued use of crutches. On October 31, 1978 appellant returned for examination complaining of pain at the fracture sites. Dr. Roe reported x-rays revealed a displaced fracture of the inferior pubic ramus and a minimally displaced fracture of the left acetabulum. He noted that the fractures continued in satisfactory alignment.

On December 2, 1978 the Office of Workers' Compensation Programs accepted appellant's claim for a fractured left superior and inferior pubic ramus and acetabulum. She received compensation for temporary total disability commencing September 22, 1978. By report dated December 26, 1978 Dr. Roe indicated appellant had been ambulating with the use of only one crutch under her left arm. Appellant continued to have pain with ambulation, but the pain had decreased. A CT [computerized tomography] scan was obtained by Dr. E. Altschuler, a Board-certified radiologist, on December 21, 1978. Dr. Altschuler found "a healed fracture extending through the superior pubic ramus into the anteromedial aspect of left acetabulum. No significant deformity of the acetabulum was seen and no definite interarticular fragments are identified within the limits of scanning resolution. There is also a slightly anterior angulated fracture of the inferior pubic ramus with incomplete bony fusion." By report dated February 28, 1979 Dr. Roe indicated appellant complained of back pain radiating down her left leg posteriorly to the heel level. X-rays of the lumbosacral spine revealed mild narrowing of the intervertebral disc space of L5-S1. Dr. Roe opined that appellant sustained a superimposed musculoligamentous tendinous strain of her low back caused by altered gait patterns occasioned by her left inferior pubic ramus fracture. Dr. Roe prescribed physical therapy and specific antispasmodic medications.

On March 15, 1979 the Office accepted appellant's claim for a musculoligamentous tendinous strain, low back, secondary to hip fracture."

By report dated April 4, 1979 Dr. Roe indicated appellant continued to complain of low back, cervical and left hand pain. Dr. Roe opined that appellant's back pain resulted from the fact that she had been walking abnormally since her fracture. He prescribed continued physical therapy and medications. On May 3, 1979 Dr. Roe opined that appellant had not reached maximum improvement as her fractures had undergone complete osseous union.

On examination of June 6, 1979 Dr. Roe indicated appellant continued to have pain in the lumbosacral area extending posteriorly into the left leg to the calf levels and left hip and groin pain. He noted appellant continued to ambulate with a cane in her right hand and wore a lumbosacral corset intermittently. By report dated July 10, 1979 Dr. Roe noted appellant complained of increased left hip pain. Dr. Roe indicated that there was a slight irregularity surrounding the symphysis pubis reminiscent of osteitis pubix.

Appellant was referred by the Office to Dr. Harvey Dannis, a Board-certified orthopedic surgeon. In a report dated March 19, 1979 Dr. Dannis noted appellant complained of headaches, dizziness, neck pain radiating into the left upper extremity, left groin pain, and pins and needles in the left lower extremity intermittently. Physical examination showed cervical mobility to be slightly limited. No neurological defect was present. There was diffuse tenderness and decreased motion in the lumbar area of the back. Tenderness was noted in the left groin. Dr. Dannis diagnosed post-traumatic head syndrome, chronic musculoligamentous cervicothoracic strain, chronic musculoligamentous lumbosacral strain, and traumatic displaced fracture of the pelvis.

By report dated March 12, 1980 Dr. Roe indicated appellant continued to have constant pain in her low back, left groin and buttock. He stated:

> "I feel this patient may now be considered permanent and stationary with respect to her injury of September 21, 1979. In this injury, the patient sustained the following injuries: (1) Fracture of the superior and inferior pubic ramus; (2) Fracture of the left acetabulum, minimally displaced. In her subsequent course of therapy, the patient manifested the following two diagnoses: (1) Musculoligamentous tendinous strain of her lumbosacral strain, secondary to prolonged altered gait pattern. This diagnosis was made on February 26, 1979. (2) Osteitis pubis, which diagnosis was made on July 23, 1979.
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> "With regards to the first two diagnoses, the fracture of the left superior and inferior pubic ramus, and the fracture of the left acetabulum, I feel the patient has gone on to achieve bony union in both instances. I feel that there is no disability resulting from the fracture of her left superior and inferior pubic ramus. With regards to the fracture of her left acetabulum, the patient has a resultant decreased range of motion involving the left hip joint area. Specifically, she flexes from 0–110 degrees on the left hip joint area. Specifically, she flexes from 1-100 degrees on the left, whereas on the right side she flexes from 0–130 degrees. She also lacks 10 degrees of adduction on the left side compared to the right side.
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> "This patient's major disability revolves from the subsequent two diagnoses, the musculoligamentous tendinous strain of her lumbar spine, and the presence of osteitis pubis, which together give this patient marked subjective disabilities. She is unable to ambulate for distances of greater than one to two blocks without the use of an assistive device. She currently uses a cane in her right hand. She has a constant moderate

> pain in her lower back area, and also in her left thigh area as a result of these two entities.
>
> "Objectively, on physical examination, I can find no definite factors of disability. Roentgenographically, the patient has abnormal lumbosacral spine x-rays which show calcification in the anterior longitudinal ligament, opposite T12 and T11, and also narrowing of the intervertebral disc space of L5, S1.
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> "Subjectively, this patient's moderate pain results in the aforementioned antalgic gait, requiring the use of a cane in her right hand. I feel that the patient is not subject to significant further improvement, and therefore has probably achieved her maximum improvement at this time.
>
> "At the present time, this patient's subjective pain would constitute in my opinion, a disability resulting in limitation to a semi-sedentary work."

On April 2, 1980 an Office medical adviser reviewed the record and found that appellant had sustained a 26 percent permanent partial loss of use of her left leg. He found appellant had reached maximum improvement by March 12, 1980. By award of compensation dated April 23, 1980 appellant was issued a schedule award for a 26 percent permanent loss of use of her left leg.

On September 10, 1980 Dr. Roe scheduled appellant for a CT scan. By report of that date Dr. G. Farjalla, a Board-certified radiologist, gave the following results:

> "There is a significant disc or annulus bulge at L4-5 which is worse on the left, associated with left neural foraminal stenosis at the same level, and mild to moderate central canal stenosis. Moderately severe osteophytic ridge or calcified disc at L5-S1, associated with significant central canal stenosis. Moderate central canal stenosis at L3-4, associated with mild left neural foraminal stenosis at the same level."

By report dated October 1, 1980 Dr. Roe indicated he had advised appellant of the CT scan results and discussed the possibility of surgery. By report dated April 1, 1981 Dr. Roe noted appellant's symptoms had remained unchanged. He indicated appellant continued to manifest signs and symptoms consistent with a herniated nucleus pulposus, L4, 5 on the left side.

On April 27, 1981 Dr. Gerald L. Stone, an Office medical consultant and Board-certified orthopedic surgeon, reviewed the case record and answered questions posed by the Office. Dr. Stone opined that appellant's symptoms involving residual groin pain and limitation of motion of the hip were related to appellant's original employment injury. However, Dr. Stone concluded that appellant's symptoms related to her spinal stenosis were unrelated to the September 21, 1978 employment injury.

By employing establishment note dated October 21, 1981 it was stated that appellant had last worked on September 21, 1979 and that she had resigned from her federal employment on February 8, 1980.

In a report dated November 3, 1981 Dr. Roe noted appellant complained of aching on the left side of her low back which radiated down her posterior left buttock and left leg to the foot. Dr. Roe again discussed the possibility of surgery and recommended a physical therapy program.

On January 4, 1981 appellant was referred to Dr. Richard H. Hall, a Board-certified orthopedic surgeon, who submitted a January 8, 1981 report. Dr. Hall reported his findings upon examination and diagnosed post-fracture status, left ischial and pubic rami into acetabulum and degenerative osteoarthritis of entire spine with spinal stenosis, probable herniated nucleus pulposis L4–5 and bilateral sacroilitis. Dr. Hall opined that appellant's clinical findings "do not appear to be very greatly relatable to the accident of September 21, 1979." He indicated that appellant had developed a progressive degenerative hypertrophic arthritic condition of her spine and sacroiliac joints which was not caused by the accident but would be in its present state naturally even had the accident not occurred. Dr. Hall opined that appellant had preexisting degenerative changes prior to the accident but they were of such low magnitude that they went unnoticed. He indicated that appellant's spinal stenosis was related to hypertrophic changes which were degenerative. He also indicated that the disc herniation was probably degenerative and purely incidental. Dr. Hall concluded:

> "The patient actually has no objective findings which can be attributed to her accident except for a few superficial cutoneous scars. Her subjective complaints appear to be entirely relatable to her disease process but the possibility of some of the subjective complaints arising from the left acetabulum cannot be completely excluded. Accordingly, I feel that arbitrarily a small portion of her left hip complaint should be attributable to the accident. However, her work capacity is reduced by the disease process but this is controllable with modern medications and therapeutic modalities.

> "Arbitrarily I believe that the patient probably recovered from her accident by 9/21/79 and that she reached maximum improvement relative to the accident by that time. I feel that further treatment should not be given to her relative to the accident because this is jeopardizing the status of her arthritis and I believe the arthritis should be treated. If she responds to anti-arthritic treatment, she should be relieved sufficiently to restore her work capacity."

On March 8, 1983 appellant was referred by the Office to Harold B. Markowitz, a Board-certified orthopedic surgeon. Dr. Markowitz performed an extensive review of the medical evidence of record and reported his findings upon examination. He noted appellant complained of pain in her neck, back, left thigh, and lateral aspect of her left leg radiating down to her ankle. Dr. Markowitz found no evidence of sciatic or neurological deficit. He diagnosed: a healed fracture of left ischial and pubic ramus, pelvis area; irregularity at pubic symphysis indicative of previous osteitis pubis; and ossification of anterior longitudinal ligament, lower thoracic, upper lumbar area of the spine indicative of probable early rheumatoid spondylitis. Dr. Markowitz opined that appellant's symptoms were not of spinal stenosis as appellant had no change in her symptoms in a lying or walking position. Dr. Markowitz recommended that appellant be referred to a rheumatologist to determine whether she sustained a condition of rheumatoid spondylitis.

Appellant was referred to Dr. Seymour Levine, a Board-certified rheumatologist, who submitted a May 4, 1983 report. Dr. Levine reviewed appellant's medical and family history and reported his findings upon examination. He diagnosed: no evidence of spondyloarthropathy or inflammatory arthropathy; osteoarthritis of the hands; Forestier's disease (ankylosing hyperostosis) of the thoracic spine; history of pelvic fracture secondary to work-related injury, and hypertension. Dr. Levine stated:

> "I could find no underlying traditional rheumatologic disease to explain this patient's basic problem. She does appear to have some degenerative disease in the symphysis pubis and, as stated in the Diagnostic Impression, probably Forestier's disease to explain the calcification that she has in the anterior longitudinal ligament of the thoracic spine. Also, the pelvis x-rays showed soft tissue calcification adjacent to the bone where she presumably had her original fracture. Her work-related injury may well have caused the degenerative changes in the

> pelvis and most likely caused the calcification in the soft tissue in the pelvis. I do not believe that the injury played a significant role in her developing the calcification in the anterior longitudinal ligament compatible with Forestier's disease process that I have already mentioned. There is no question, though, that if that disease was present already that such a fall and injury that the patient had could well have exacerbated and aggravated any underlying arthritis of the spine, such as Forestier's disease."

Dr. Levine concluded that appellant's condition was permanent and stationary and had resulted in a disability precluding her from doing any work whatsoever.

In a supplemental report dated May 21, 1983 Dr Markowitz noted x-rays of appellant's pelvis and left hip had shown satisfactory healing. Dr. Markowitz indicated that appellant clinically had no evidence of spinal stenosis of the lumbar spine. He opined that appellant had some degenerative arthritis in the thoracic and lumbar spine of the back which preexisted her work injury of September 21, 1978. He found that appellant's slight limitation of motion of the lower back area was secondary to the degenerative arthritis of her lower back area. Dr. Markowitz concluded that appellant had a temporary disability in her neck, back, pelvis and left hip area, which was caused by the work accident. He noted that appellant's temporary disability ceased on December 21, 1978 and she was able to return to her usual work activities. Dr. Markowitz stated that 'no further medical treatment and no surgical treatment for injuries sustained in the accident of September 21, 1978 is indicated."

On June 29, 1983 and August 4, 1983 Dr. Lesley J. Anderson, an Office orthopedic consultant, reviewed the case record and opined that appellant's interior and superior pubic ramus fractures and acetabulum fracture had healed and did not appear to have any significant residuals. He found appellant's spinal stenosis condition unrelated to the original employment injury. Dr. Anderson noted a conflict of medical opinion between Dr. Markowitz, who released appellant to full activity, and Dr. Levine, who opined that appellant was completely disabled. Dr. Anderson opined that appellant's current disability for work was related to appellant's spinal stenosis condition and not her employment injury.

By letter dated November 28, 1983, January 30, 1984 and August 31, 1984 the Office posed questions to Dr. Roe regarding appellant's current disability. By letter dated September 28, 1984 Dr. Roe responded stating, that appellant had some residual disability related to the accepted conditions from her September 21, 1978 employment injury due to her low back strain. Dr. Roe, however, found the level of disability to be "minimal to slight." He opined that appellant had recovered from her previous fractures without any residual disability. Dr. Roe indicated that appellant's current disability was strictly related to her spinal stenosis condition. Dr. Roe stated that the CAT scan (taken on September 10, 1980) had "revealed the presence of multiple abnormalities in her lumbosacral spine, which I feel are operative in causing this patient's current inability to work. It is not felt by this examiner that the patient's injury aggravates or exacerbated a preexisting condition. It is felt by this examiner that the patient's lumbar spinal canal stenosis has become apparent of its own volition and would most likely have become apparent in the present extent and manner, even in the absence of an acute injury."

On October 29, 1984 Dr. Anderson reviewed the case file and opined that appellant's current disability appeared to be primarily related to her spinal stenosis and not related to her work injury. By letter compensation order dated May 14, 1985 the Office terminated appellant's compensation benefits after June 8, 1985 finding that the weight of the medical evidence established that appellant was no longer disabled as of that date due to her September 21, 1978 employment injury.

By letter dated July 10, 1985 appellant requested reconsideration of the Office's May 14, 1985 decision, submitting a July 3, 1985 report of Dr. Stephen D. Taus, a Board-certified internist. In his report Dr. Taus noted that he had treated appellant since October 6, 1980. Dr. Taus reviewed appellant's medical history since the 1978 employment injury and stated:

> "Examination of the lumbosacral spine has revealed constant tenderness to palpation with muscle spasm present. Examination of the left hip reveals pain of minimal abduction. This patient has been unable to do some of the activities of daily living. Any activities involving bending, stooping, or standing for prolonged times cause increase of pain. Her husband does much of the housework. The patient is definitely unable to work, secondary to her arthritis and chronic left hip and low back muscular ligamentous injuries. She has had to modify a great many of the activities of her life in order to conform to the limitations set upon her by her pain. She is subject to

> flare-ups of pain at times with minimal provocation and will need medical therapy for the rest of her life."

By letter dated August 6, 1985 the Office advised appellant that Dr. Taus was not an orthopedist, and therefore, his opinion would be considered if he provided a detailed description of the objective findings that support that appellant continued to suffer from residuals of the original work injury, and if he provided a rationalized opinion explaining how the left hip fracture and lumbosacral sprain of September 21, 1978 continued to disable appellant. Dr. Taus submitted an additional medical report dated August 24, 1985 in response to the Office's request. In his report Dr. Taus stated that appellant "has been definitely disabled as a result of her employment injury." Upon examination he stated:

> "The lumbosacral spine on inspection reveals a slight tilt to the left. The patient walks with a small limp. The palpation of the lower left lumbar sacroiliac area does reveal mild tenderness to palpation, as well as tenderness in the left hip and groin area. There is pain on flexion at 25 degrees, as well as extension of 10 degrees. There is increased pain on left lateral flexion to 20 degrees, as well as 20 degrees on the right. The patient has a negative straight leg raising test.
>
> "Examination further of the left hip reveals a markedly positive FABER test with abduction of the left hip.
>
> "The neurologic exam reveals some mild decreased sensation in the L5–S1 dermatome.
>
> "I am told that the opinion of the orthopedic surgeon, a Dr. Roe, was that the patient has recovered from her injuries for this accident. It is quite clear to me that this patient has had constant and persisting symptomatology as a result of this accident, and that she is definitely disabled as a result of this accident. She is unable to work."

The Office found a conflict in the medical opinion and referred appellant, the case record, a statement of accepted facts and questions posed by the Office to Dr. Geoffrey Miller, a Board-certified orthopedic surgeon, to act as an impartial medical specialist. Dr. Miller examined appellant on November 20, 1985 and submitted a November 21, 1985 report. Dr. Miller reviewed the case record and noted appellant currently complained of lumbosacral and left buttock pain that radiated bilaterally to the posterior aspects of both legs and occasionally into her left groin. Upon physical examination Dr. Miller indicated appellant demonstrated a normal gait and station with a slight left hip antalgic component. He found appellant's range of motion of the cervical and dorsal spines were within normal limits without signs of tenderness or spasm. Dr. Miller found appellant's left hip fracture had healed with a slight limitation of hip motion. X-rays of the AP [anterior-posterior] and lateral of the lumbosacral spine showed moderate degenerative changes with calcification of the anterior longitudinal ligament. The AP pelvis and left hip showed a nonunion of an avulsion fragment off the left inferior pubic ramus, but a well-healed superior pubic ramus and no acetabular abnormality, and no joint space narrowing or other abnormality of the left hip. Dr. Miller diagnosed "status post-superior and inferior pubic ramus fractures left hip with extension at the acetabulum-healed, permanent and stationary" and "extensive lumbar spinal stenosis with radicular lower extremity symptoms. Lumbosacral strain secondary to September 21, 1978 injury." Dr. Miller indicated that appellant's employment injury of 1978 consisted of the motor scooter falling directly on appellants left hip causing the hip and pubic area to absorb the entire shock energy from the fall while little stress was exerted by appellant's low back. Dr. Miller felt that this explained why appellant did not have any initial low back symptoms at the time of injury. He indicated that appellant's lumbar spine symptoms, which were not noted until February of 1979, were due to preexisting lumbar spinal stenosis that may have become more symptomatic due to appellant's abnormal gait mechanism due to her left hip injury, but were not primarily related to the employment injury. He noted that Dr. Markowitz, Dr. Anderson, Dr. Roe and Dr. Levine all shared this opinion. He opined that appellant's current back symptoms were due to her preexisting spinal stenosis with its associated radiculopathy. He found that appellant's superior and inferior pubic ramus and left acetabular fractures, as well as appellant's lumbosacral strain had resolved and was permanent and stationary without residuals by September 21, 1979. Dr. Miller concluded that appellant currently was not disabled from her former position due to employment-related residuals. He stated: "this is based on the fact that the natural course of healing, of the fracture she sustained, would be no more than six weeks to six months and this was extended by Dr. Roe because of subjective complaints. The x-ray findings of healing are generally accepted or equivalent to the clinical course, i.e. Once the fractures are healed by x-rays the clinical symptoms have resolved."

By letter compensation order dated January 28, 1986 the Office reviewed the case on its merits and denied modification of its prior decision finding that the evidence submitted in its support was insufficient to warrant such modification.

By letter dated August 29, 1986 appellant requested reconsideration of the Office's January 28, 1986 decision submitting a July 3, 1986 report by Dr. Jacob E. Tauber, a Board-certified orthopedic surgeon. Dr. Tauber reviewed the case history and reported his findings upon examination. He stated:

> "*PHYSICAL EXAMINATION:*
>
> "Physical examination demonstrates the patient is a well-developed, well-nourished female in moderate distress. She has difficulty with her gait and has a limp on her left lower extremity. She is able to arise on her toes and heels.
>
> "There is pain to palpation about the lower lumbar spine and left sacroiliac joint. Straight leg raise produces pain in the low back radiating to the left hip and thigh. Rotation is limited of the left hip.
>
> "Neurological examination demonstrates decreased sensation to pin prick over the dorsum and lateral aspect to the left foot. Range of motion of the low back is guarded and is limited to approximately 75 percent of normal motion. The patient has a Trendelenburg gait pattern. Motor strength is otherwise intact and deep tendon reflexes are intact.
>
> "*X-RAYS:*
>
> "X-rays of the lumbosacral spines demonstrate some degenerative disc disease. X-rays of the pelvis and a lateral of the left hip demonstrate the healed fractures.
>
> "A Bone Scan was obtained which demonstrated an old healed fracture of the descending pubic ramus on the left. A CAT Scan performed on November 14, 1985 demonstrates severe abnormalities at the L–5/S–1 level and at the L–4/5 level on the left.
>
> "The patient returned to the Office on July 3, 1986 indicating that she continues to have back pain with radiation to her hip. She has a positive straight leg raise test bilaterally and there is decreased sensation to pin prick over the lateral aspect of the right foot, in addition."

Dr. Tauber diagnosed healed fractures of pubic ramus and sciatic, secondary to spinal and foramenal stenosis. Dr. Tauber indicated that appellant was not aware of her low back condition at the time of injury because sciatica may not be symptomatic while a patient is at bed rest. In addition, Dr. Tauber noted that the pain from appellant's fractures may have superseded the pain of the sciatic. Dr. Tauber stated:

> "Even if the patient had a preexisting spinal and/or foraminal stenosis, there is no question that this patient performed all of her work activities without any restrictions until the injury occurred.
>
> "It was only following the injury that the patient became aware of her difficulties and was thus unable to carry out her usual work activities and in fact now has constant pain.
>
> "Thus, there is no question that the work injury caused her fractures and any sequelae due to the fractures. There is also no question that even if the patient had a preexisting spinal and/or foramenal stenosis, as per all of the reports, that the work injury caused these findings to become symptomatic.
>
> "Thus, the patient has had a permanent aggravation of an asymptomatic preexisting condition as a result of her work injuries.
>
> "It is entirely possible that this patient would never have had symptoms had it not been for the work injury. This is an unpredictable event, but it is now without question that the patient began to have symptoms after her injury, and thus I would attribute a minimum of 75 percent of her sciatic symptoms as being due to the work injury."

On November 19, 1986 Dr. Anderson reviewed the case file and opined that the medical evidence of record did not support the contention that appellant's 1978 employment injuries caused or precipitated appellant's spinal stenosis or any neurological problem. Dr. Anderson noted that Dr. Tauber did not provide any rationale to support his conclusion that appellant's work injury caused her preexisting spinal stenosis to become symptomatic.

By letter compensation order dated January 29, 1987 the Office reviewed the claim on its merits and denied modification of its prior decision finding that the evidence submitted on its behalf was insufficient to warrant such modification.

By letter dated March 9, 1987 appellant requested reconsideration submitting a February 12, 1987 report by Dr. Tauber. In his report Dr. Tauber indicated that appellant had a spinal stenosis and foramenon stenosis condition prior to her employment injury that was asymptomatic. He contended that appellant sustained permanent aggravation of her preexisting conditions as a result of her employment injury. He reiterated that it was possible that appellant never would have had symptoms of this condition if it had not been for her work injury. Dr. Tauber stated that "it is impossible for any examiner to say that all people with spinal stenosis eventually develop symptoms." He opined that the reason why appellant's spinal stenosis condition was not well-diagnosed was that appellant's pain was attributed to the fractures she had sustained during the work injury. Dr. Tauber concluded "it is ludicrous to believe that there was no problem in this patient as a result of her work injury . . . without question her spinal stenosis did in fact exist at the time of her trauma, and I have indicated to her that there are individuals who do in fact have permanent aggravations as a result of a trauma."

On April 17, 1987 Dr. Anderson reviewed the case record including Dr. Tauber's February 12, 1987 report and noted that Dr. Tauber did not go into detail as to why his opinion should supersede the opinions of Dr. Roe, Dr. Stone, Dr. Hally, Dr. Markowitz or Dr. Miller. Dr. Anderson opined that the weight of the medical evidence continued to support the contention that appellant's current disability due to her spinal stenosis condition was not causally related to employment-related residuals of her September 21, 1978 injury.

By letter compensation order dated May 18, 1987 the Office reviewed the case on its merits and denied modification of its prior decisions finding the evidence submitted in its behalf insufficient to out weigh the many previous medical reports of record.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[1]

The Board finds that case is not in posture for decision.

Appellant's claim was accepted by the Office for a fracture to the left superior and inferior pubic ramus and acetabulum, and a musculoligamentous tendinous strain, low back, secondary to her hip fracture. She was treated by Dr. Roe, a Board-certified orthopedic surgeon, who found that appellant had continuing disability due to a back condition caused by altered gait patterns necessitated by her left inferior pubic ramus fracture. However, by report dated July 10, 1979 Dr. Roe indicated he could not explain why appellant still complained of left hip pain. Dr. Stone, an Office medical consultant reviewed the case record on April 27, 1981 and opined that appellant's symptoms related to her spinal stenosis were unrelated to her original employment injury. Appellant was referred by the Office to Dr. Hall who opined that appellant had recovered from her injuries related to the 1974 work injury and found that her continuing disabilities were due to her spinal stenosis condition. The Office also referred appellant to Dr. Markowitz who found that appellant's temporary disability from the work injury had ceased on December 21, 1978. He opined that any continuing disability was secondary to degenerative arthritis of her lower back which had preexisted the work injury. Dr. Anderson, an office medical consultant, reviewed the record on June 29, 1983 and August 4, 1983 and opined that appellant's fractures from her work injury had healed without any significant residuals. She found appellant's spinal stenosis condition related to the original employment injury.

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[1] *Bernard A. Pollutro*, 31 ECAB 176 (1979).

By report dated September 28, 1984 Dr. Roe indicated that appellant had recovered from her previous fractures without any residual disability. He opined that appellant's current disability was strictly related to her spinal stenosis condition.

At the time that the Office terminated appellant's compensation, June 8, 1985, the weight of the medical evidence established that appellant's continuing disability was not related to her September 21, 1979 employment injury. The Office had met its burden of proof justifying termination of appellant's compensation benefits.

On reconsideration of the Office's May 14, 1985 decision appellant submitted reports by Dr. Taus dated July 3, 1985 and August 24, 1985. Based on a conflict in medical opinion between Drs. Taus and Roe, appellant was referred to Dr. Miller, a Board-certified orthopedic surgeon, to act as an impartial medical specialist. The Board notes, however, that the Office found a conflict in the medical opinion evidence between two of appellant's attending physicians. Section 8123(a) of the Federal Employees' Compensation Act states:

> "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the secretary shall appoint a third physician who shall make an examination."

The Office incorrectly referred appellant for an impartial medical specialist review based upon a conflict in medical opinion between two of appellant's treating physicians.[2] Dr. Miller, therefore, has the status of an Office referral physician and not as an impartial medical specialist. Nevertheless, the Board finds that the Office's January 28, 1986 decision was proper as the weight of the medical evidence rested with the thorough and well-rationalized report of Dr. Miller who found that appellant's superior and inferior pubic ramus and left acetabular fracture condition, and lumbosacral spine condition had resolved. Dr. Taus' medical opinion evidence was of diminished probative value as his reports did not address the issue of how appellant's employment injury caused or aggravated her spinal stenosis condition.[3]

Upon reconsideration of her claim appellant submitted reports by Dr. Tauber dated July 3, 1986 and February 12, 1987 which stated that appellant sustained permanent aggravation of her preexisting spinal stenosis and foramina stenosis condition as a result of her employment injury. The Board notes that Dr. Tauber's reports now create a conflict in the medical evidence of record with Dr. Miller as to whether appellant continues to sustain residuals resulting in disability due to her September 21, 1978 employment injury. This conflict in the medical evidence of record necessitates referral to an impartial medical specialist for resolution pursuant to 5 U.S.C. section 8123(a).

On remand the Office should prepare a statement of accepted facts and refer it, together with appellant and the case record, to an impartial medical specialist. The Office should request the impartial specialist to provide a diagnosis of appellant's condition and, based on that diagnosis, provide a rationalized medical opinion as to whether appellant sustained any residuals from her September 21, 1978 employment injury causing any disability after June 8, 1985. After any further development deemed necessary, the Office should issue a *de novo* decision.

The decisions of the Office of Workers Compensation Programs dated January 29, 1987 and May 18, 1987 are hereby set aside and the case remanded to the Office for further development consistent with this decision by the Board.

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[2] *Constance C. Mandick*, 38 ECAB 595 (1987).

[3] *See Eloise L. Berry*, 25 ECAB 61 (1973).

In the Matter of WILLIAM D. ZERRILLO *and* DEPARTMENT OF JUSTICE, U.S. MARSHALS SERVICE, McLean, Va.

Docket No. 86-1266; Hearing January 19, 1988;
Issued February 22, 1988

Appearances: *John G. Carney, Esq.* for the appellant; *LuAnn B. Kressley, Esq.* for the Director, Office of Workers' Compensation Programs.

Before GEORGE E. RIVERS, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether appellant's injury which occurred in a private health club after work hours on March 8, 1984 constituted an injury in the performance of duty, thereby entitling him to compensation benefits and continuation of pay.

On March 8, 1984 at 6:15 p.m. appellant, a 34-year-old inspector (witness security specialist), tore his left achilles tendon while exercising in a private health club. He alleged "while engaged in exercise, the tendon ripped. This occurred while engaged in a planned exercise program enabling me to stay qualified in a specialized area of my employment, (protective services) which [has] stringent physical standards to be met." Appellant listed the place of injury as the "Main Gym, Philadelphia Athletic Club," and his work hours as 8:30 a.m. to 5:00 p.m. Appellant was absent from work March 12 to 19, 1984.[1] On March 19, 1984 appellant returned to work in a light-duty capacity.

The employing establishment controverted appellant's claim for continuation of pay stating "At present there are no written requirements in the U.S.M.S [United States Marshal's Service] manual establishing the need for physical fitness programs outside of the normal duty hours."

In an undated letter the Office of Workers' Compensation Programs asked appellant's employing establishment whether inspectors are required to maintain physical fitness and, if so, how the agency insures that this is done. The Office also asked whether the employing establishment provided facilities for the workers to keep physically fit and whether it paid dues for membership in health clubs for that purpose.

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[1] Appellant was treated on March 10, 1984 by Dr. Paul C. Lehmuller, a Board-certified orthopedic surgeon, who diagnosed "rupture of gastro soleus musculo tendinous junction" as resulting from the March 8, 1984 incident.

In its May 1, 1984 response the employing establishment stated as follows:

> "Presently, physical fitness is a requirement of all Deputy U.S. Marshal's training at both the United States Marshal's Training Academy in Glynco, Georgia, and the United States Marshal's Special Operations Group Training Center in Pineville, Louisiana. At present, a standardized physical fitness program for all 93 districts of the Marshal's Service is being researched here at Headquarters, but cannot be implemented until the issue has been negotiated with the Union. Therefore, all physical fitness programs are voluntary. All operational personnel are encouraged to maintain some kind of exercise program as the duties of a Deputy can be strenuous. * * *
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> ". . . [D]epending upon available funds, some districts do pay memberships to health clubs. However, in this particular case, no funds were paid by the service."

By compensation order dated November 6, 1984, which incorporated a memorandum summarizing the evidence, the Office "ordered that the claim for continuation of pay and compensation benefits be rejected as the claimant was not in performance of duty when injured." By a second decision of the same date the Office denied appellant's claim for continuation of pay for the period March 12 to 18, 1984 on the ground that appellant was "not in the performance of duty when injured."

Appellant requested reconsideration of the Office's November 6, 1984 decisions and submitted a November 28, 1984 memorandum from the employing establishment regarding the designation of "Fitness In Total Program Coordinators." The memorandum stated that the "Fitness-In-Total (FIT) Program will be implemented service-wide in February 1985," and that the program is designed "to enhance the health and physical fitness of the U.S.M.S. work force by providing fitness assessments, exercise and nutrition prescriptions, wellness education and motivation." Attached to the memorandum was a copy of the application for the "FIT" program.

Appellant submitted a statement dated October 16, 1985 in which he stated that in order for him to keep his position as an inspector he had to meet certain physical fitness requirements. He stated:

> "I am presently and have been since October 1982 employed as an Inspector (Witness Security Specialist) for the United States Marshal's Service. As a prerequisite for my promotion to this position from that of Deputy U.S. Marshal which I had held since May 1971, I was required to attend and successfully complete Protective Services School. An admission requirement to this school was a test of physical endurance in which I had to complete the following: a one mile run in less than 8 min., 20 push ups and 25 sit ups. All exercises being completed in succession without a rest period. * * * In order for me to continue in my status as a Protective Services qualified inspector it is necessary for me to be tested and complete [specified exercises]. At the time of my injury I was engaged in a physical fitness program at the Philadelphia Athletic Club. The injury was incurred after normal duty hours as it was not the policy of the U.S.M.S. at this time to grant time during the normal workday for workouts to stay at the level of fitness to meet the requirements which they had required. Since the time of my injury the U.S.M.S. has officially incorporated on-duty time to meet a fitness program of their established fitness standards.
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> * * *
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> "The normal requirements (physical) of a Deputy U.S. Marshal both on the annual physical as well as the day-to-day fitness needed for the rigorous tasks of a law enforcement position require a high level of fitness. * * * These physical tests are determining factors which are used to determine whether an employee should be continued in a 'full duty' status. It is my feeling that the U.S.M.S. had placed me in a position in which my being in a high level of physical fitness was a stated requirement of my position, but the U.S.M.S. both didn't give any time during the work day and will not until now state that it felt that my injury was 'job related.' "

By compensation order dated January 22, 1986, which incorporated a memorandum summarizing the evidence, the Office denied modification of its prior decision on the ground that the submitted evidence was insufficient to warrant modification.

The Board finds that appellant's injury which occurred in a private health club after work hours on March 8, 1984 did not constitute an injury in the performance of duty; therefore, he was neither entitled to compensation benefits nor continuation of pay.

In determining whether an injury which occurred during a recreational activity was within the scope of employment, the Board has previously relied on Larson's treatise on workmen's compensation law.[2] In his treatise Larson lists three criteria for determining whether an activity is within the scope of employment. The general criteria for performance of duty as it relates to recreational and social activities is set forth in Larson as follows:

> "Recreational or social activities are within the course of employment when (1) they occur on the premises during a lunch or recreation period as a regular incident of the employment; (2) the employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or (3) the employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life." [3]

The Board had emphasized that these are discrete criteria noting that Larson characterized these as "three independent links . . . by which recreation can be tied to the employment, and if one is found, the absence of the others is not fatal."[4]

Appellant does not contend, nor does the evidence of record establish, that his injury occurred on the employing establishment premises during a lunch or recreation period. The injury took place after working hours and off the employing establishment premises. Ergo, the first criterion, is eliminated from consideration. Notwithstanding, appellant, through his attorney, contended on appeal and at oral argument held before the Board on January 19, 1988 that the employing establishment derived a substantial benefit from appellant by his participation in the exercise program at the health club, which was appellant's ability to continue in his position because of his improved state of health, and/or high level or physical fitness without having to hire a replacement.

Turning now to the specified facts of the instant case, the Board notes that on March 8, 1984 appellant was exercising off of the employing establishment's premises at a private health club, after working hours, when he was injured. Appellant contended that by the very nature of his job as an inspector (witness security specialist) he was required to engage in a "planned exercise program" to meet the "stringent physical standards" of the position, and to pass an annual endurance test to maintain his status as a protective services qualified inspector. The Board further notes that the evidence or record, as presented by the employing establishment, establishes that at the time of appellant's injury there was no necessity for a physical fitness program "outside of the normal duty hours;" that although "[a]ll operational personnel" were encouraged to engage in an exercise program since the duties of appellant's position "can be strenuous," "all physical fitness programs are voluntary;" and that despite the fact certain district office paid membership to health clubs on behalf of their employees, the district to which appellant was assigned did not appropriate such funds.[5]

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[2] *See e.g., Bruce A. Romeo*, 35 ECAB 1012 (1984); *Beatrice C. Ferdinand*, 32 ECAB 1698 (1981); *Etta D. Childs*, 25 ECAB 81 (1973).

[3] Larson, *Workmen's Compensation Law*, section 22.00.

[4] *Clifford G. Smith*, 32 ECAB 1702, 1704 (1981); *Stephen H. Greenleigh*, 23 ECAB 53, 56 (1971). *See also* Larson section 22.11.

Thus, the record shows that no recreational facilities or activities had been provided, sponsored, or initiated by the employing establishment to prepare its personnel for annual endurance testing.[6] Moreover, the record shows that the exercise program appellant participated in at the private health club on March 8, 1984 was voluntary, and that the employing establishment neither financially assisted, sponsored, nor exercised control over, the exercise program appellant engaged in on the date of injury.[7]

In view of the foregoing, the Board finds that, as appellant was not required by the employing establishment to participate in an exercise program to prepare himself to pass an annual endurance test which qualified him to retain his position, and as the employing establishment did not participate in the sponsoring of the exercise program held at the private health club where appellant was injured, appellant's injury was not sustained in the performance of duty.[8]

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[5] *See Mildred H. Bender*, 11 ECAB 234 (1959). In this case the Board found that the employee's death was not sustained in the performance of duty as the recreational facilities the employee attended, and activities the employee engaged in on the date of his death, were neither provided, sponsored, nor initiated by the employing establishment but were organized by participating individuals. Accordingly, the Board found that the employing establishment did not derive any direct substantial benefit and the activities were not of a kind which would be regarded as incidental to the employment.

[6] *Id.*

[7] Larson states that the outcome of recreational activities, with respect to whether an injury sustained while participating in such activities was employment related, turns on the "different 'mix' in the fact situation," i.e., "[o]n or off the premises and in or out of working hours; varying shades of employer initiative; differences in amount of employer contribution of money or equipment; differing quantities and types of employer benefit." Larson, section 22.24. For example, the Board found in the case of *Kermit T. Bryant*, 30 ECAB 893 (1979) that appellant, who injured his back in a softball game on the employing establishment premises after working hours, was not within the performance of duty when injured. The Board found that, with the exception of the fact that the game was played on the employing establishment's premises, there was no showing of a "substantial causal connection with the employment," i.e., the evidence did not demonstrate that the employing establishment sponsored, financially assisted, or exercised control over the softball program, or that it derived a substantial direct benefit from the activity beyond the intangible value of improved employee health and morale.

Accordingly, the employing establishment did not derive any substantial direct benefit from appellant's participation in the exercise program except for "the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life."

Appellant enrolled and participated in the exercise program at the private health club to foster and/or to facilitate his passage of the annual endurance test; the passage of which would result in his retention of his position with the employing establishment. Hence, the only substantial direct benefit to be derived would be to appellant, i.e., to remain employed.

The Board notes that the fact that the employing establishment implemented a "Fitness-In-Total" program "service-wide" in February 1985 was irrelevant to this case as there was no physical fitness program in effect which required an employee's participation as part of the employment at the time of appellant's injury. This in effect eliminates criterion number two as the employing establishment did not, expressly or impliedly, require participation in the exercise program sponsored by the private health club and did not bring the activity "within the orbit of the employment."

The decision of the Office of Workers' Compensation Programs, dated January 22, 1986, is hereby affirmed.

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[8] *Compare* what Larson terms the "employer compulsion" theory, which provides: "If the activity, although not an integral part of the job, is in effect required, it is clear enough that the employee has brought that activity within the employment. Thus, if the employee was required to go the company picnic or dinner at which he was hurt, or to take certain exercise, or even to go to a particular funeral the course of employment continues. The compulsion need not take the form of a direct order, if the employee is made to understand that he is to take part in the affair." Larson, section 22.22.

In the Matter of WILLIAM C. IADIPAOLO *and* U.S. POSTAL SERVICE, POST OFFICE, Warren, Mich.

Docket No. 87-1851; Submitted on the Record;
Issued February 24, 1988

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether appellant's disability following a myocardial infarction is causally related to factors of his federal employment.

On February 11, 1984 appellant, then a 38-year-old letter carrier, filed a claim asserting that his disability commencing February 8, 1984 following a "coronary attack" that day was causally related to the "extreme work load," "excessive hours," and "constant office and field surveillance" at work. He has not returned to work.

In a discharge summary, Dr. Stanley B. Wolfe, a Board-certified internist of professorial rank specializing in cardiovascular disease, reported that appellant was hospitalized from February 8 through 20, 1984, discussed the laboratory data and the findings on examination, and stated:

> "HISTORY: [Appellant] . . . has been working very long hours, up to 11 hours a day, six days a week, carrying 50 to 80 pounds of mail at a time. He was awakened at 3 a.m. [on February 8, 1984] with severe substernal pain radiating to his left arm, and sweating. He came to the emergency room . . . and after a number of hours began to improve. He remembers having a half-hour chest pain twice in the spring and summer of 1983. He was told [he had] high blood pressure about five years ago, treated for a year, and [had] no treatment for four years. He smoked one and a half packs [of cigarettes] a day for fourteen years. * * *
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> * * *
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> "HOSPITAL COURSE: After a few days, when the pain was completely gone, the IV [intravenous] Nitroglycerin was weaned, and activities were resumed . . . Emphasis was spent on proper diet, low cholesterol, weight reduction, abstinence from smoking and modification of other risk factors . . . At the time of discharge, he was sent home to be inactive. * * *
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> "FINAL DIAGNOSIS: Acute inferior myocardial infarction."

In a report dated May 17, 1984 Dr. Armando C. Madrazo, an associate of Dr. Wolfe and a Board-certified internist specializing in cardiovascular disease, stated:

> " * * * [Appellant] worked the day prior to his admission to the hospital and felt extreme fatigue after he returned home. He suffered the acute onset of chest pain that same night and was admitted to South Macomb Hospital, where he suffered an acute inferior wall myocardial infarction, confirmed by serial enzyme testing and electrocardiographic changes. Because of his youth he was then admitted to William Beaumont Hospital

> and underwent cardiac catheterization on April 9, 1984. This revealed normal left ventricular function and complete occlusion of the right coronary artery and a residual 85% stenosis in branches of the circumflex. His diagnosis was arteriosclerotic heart disease and status post myocardial infarction with complete occlusion of the right coronary artery and residual stenosis on a branch of the circumflex. This means the patient has two-vessel disease with normal left ventricular function.
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> * * *
>
> "Since discharge this patient has been trying to increase his level of cardiorespiratory fitness, and at the present he has completely recovered from his prior heart attack. * * * His prognosis will depend on recurrence of angina pectoris. * * * In answer to [the Office of Workers' Compensation Program's] question regarding the factors of employment . . . responsible for his condition, we feel that the undue stress aggravated a preexisting arteriosclerotic heart condition which resulted in an acute myocardial infarction. * * *"

Dr. Garo B. Darian, an internist acting as an Office medical consultant, reviewed the medical evidence, and in a report dated July 15, 1984, stated:

> " * * * [Appellant] suffered an inferior wall myocardial infarction while off duty. * * *
>
> " . . . It is my opinion that [his] . . . disease is not causally related to his employment. I also believe it was not precipitated, accelerated, proximately caused or aggravated by factors of employment. My reasons are as follows:
>
> > '[He] has arteriosclerotic coronary artery disease which progressed according to the natural progression of this disease to eventually cause a myocardial infarction. The evidence for the progression of [the] underlying disease lies in the fact that [he] experienced two previous chest pains in 'spring and summer of 1983' which may have been caused by his coronary arteriosclerosis, although one cannot be absolutely sure. However, in view of the documented coronary artery narrowing (by catheterization) . . . it is *highly* probable that the chest pains were warning signs of an impending myocardial infarction.

> 'It is not universally accepted that 'stress' is causally related to arteriosclerotic coronary disease. The proposed theories are speculative and should be viewed as such until more scientific evidence supports this theory further.
>
> '[Appellant] has two important risk factors for arteriosclerotic cardiovascular disease, smoking and hypertension. * * *
>
> '[He] developed chest pain while off duty. If one assumes that 'stress' had a role in this person's myocardial infarction, precipitation or otherwise, which I do not, I would have expected that this person's myocardial infarction would have taken place when the stress was maximal, *i.e.*, while at work. And this was not the case.' "

By compensation order dated December 28, 1984, incorporating by reference a Memorandum to the Director, the Office rejected appellant's claim, finding that the medical evidence did not establish a causal relationship between appellant's myocardial infarction and factors of his employment.

By letter dated January 9, 1985, appellant by his attorney, requested a hearing.

By a decision dated March 4, 1985, finalized the same day, an Office hearing representative vacated the Office's earlier decision, finding that the case should be remanded for referral to an impartial medical specialist to resolve a conflict in the medical evidence between Dr. Madrazo and the Office medical consultant.

By letter dated March 27, 1985 the Office referred appellant, along with a statement of accepted facts and the medical records, to Dr. Seymour Gordon, a Board-certified internist of professorial rank specializing in cardiovascular disease.

A report was submitted by Dr. Gordon's associate,[1] Dr. Gerald C. Timmis, a Board-certified internist of professorial rank specializing in cardiovascular disease. In the report, dated April 17, 1985, based on an examination on April 16, 1985, Dr. Timmis reviewed appellant's medical records, discussed his findings on physical examination and the results of an electrocardiogram, and stated:

> "* * * [Appellant] . . . in early February of 1984, sustained an acute inferior wall myocardial infarction which was the presenting clinical evidence of his having had coronary heart

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[1] The report was submitted on the letterhead of "Gordon-Timmis & Associates, P.C." The record indicates that Dr. Gordon accepted the referral. It is not clear why Dr. Timmis, rather than Dr. Gordon, performed the evaluation.

> disease. Prior to this he had enjoyed good health. He was smoking approximately a pack and a half of cigarettes per day. Otherwise there was no history of heart disease or hypertension (which has since been discovered).[2] He had been working extremely long hours carrying physical burdens (mail) in the course of which he was exposed to stressful conditions (supervisory surveillance). This was particularly intense for approximately three weeks immediately antecedent to his myocardial infarction.
>
> * * *
>
> "Impression: The above findings are consistent with the diagnosis of coronary heart disease presenting as an acute inferior wall myocardial infarction which was the index clinical event . . . [Both] his physical and emotional stress endured for the three weeks prior to his myocardial infarction, while not intrinsically etiologic, may have clearly contributed to the final acute event. * * *"

Dr. Madrazo then submitted a report dated April 3, 1985 indicating:

> "* * * [During] the 59-week period prior to his myocardial infarction, the patient averaged 10.86 hours per week of overtime. During the week immediately prior to his hospitalization, he worked 19.23 hours of overtime. * * * When walking his route he would carry a satchel weighing up to 35 pounds on his shoulder.
>
> "On February 8, 1984 he worked that day and felt extremely fatigued after work and returned home. An acute onset of chest pain developed that same evening, and this precipitated his visit to South Macomb Hospital where a myocardial infarction was documented. * * * We feel that the employment factors and induced stress could have aggravated a preexistent arteriosclerotic heart condition which resulted in the acute myocardial infarction."

By letter dated July 9, 1985 the Office informed Dr. Timmis:

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[2] The hospital discharge summary by Dr. Wolfe indicated, however, that appellant "was told [he had] high blood pressure about five years ago."

> "The history . . . you [gave] was somewhat inaccurate. [Appellant] has history of a year of treatment dating back to 1979 for hypertension. * * * We would . . . appreciate receiving your well-rationalized professional opinion regarding the issue of whether factors of [appellant's] employment were directly or indirectly responsible for the specific February 8, 1984 angina attack and subsequent myocardial infarction. * * *"

Dr. Timmis submitted a supplemental report dated July 19, 1985 indicating:

> "The point you raised regarding a history of hypertension since 1979 is not germane to the current question . . . The issue is . . . whether or not job-related influences contributed to his myocardial infarction. As previously stated, the answer . . . is yes. There is no question that [appellant's] coronary heart disease reflects a pathologic process in progress for many years. There is also no question that . . . the delicate supply-demand relationship reflecting heart muscle demands for nourishment and the marginal capacity of diseased coronary arteries to supply it can be disturbed by emotional stresses of the type to which [appellant] felt he was exposed in the three weeks immediately preceding his coronary event.
>
> "* * * It is my belief that the stresses and negative influences to which he was exposed were temporary and remedial. Moreover, with what the patient has learned in the course of his therapy he should be better able to deal with them."

The Office medical consultant again reviewed the medical evidence, and in a report dated September 16, 1985, stated:

> "Since current medical knowledge is insufficient to explain the exact processes that take place immediately preceding a myocardial infarction, I consider the . . . explanations [by Drs. Madrazo and Timmis] highly speculative. I disagree with them. (For reasons—refer to my earlier September 15, 1984 opinion)."

The Office determined that Dr. Timmis' supplemental report was insufficient to clarify his original report and referred appellant, along with a statement of accepted facts and the medical records, to Dr. Donald C. Overy, a Board-certified internist of professorial rank specializing in cardiovascular disease, for a second impartial examination and report.

In a report dated March 19, 1986, based on an examination that day, Dr. Overy discussed appellant's medical history and his findings on examination, and stated:

> "He drank large amounts of coffee but is now on decaffeinated coffee. He smoked 1½ packs per day from the sixth grade[3] until the time of the coronary. He rarely drank.
>
> "This man served as a postman since the age of 18. He believes that his illness is work related because of the following facts:
>
> > '(1) He had an excessive workload, often carrying large amounts of mail and taking extra streets. He walked an average of seven miles per day, and then often stood at condominiums stuffing several mailboxes.
> >
> > '(2) Tension at his work. His bosses often visited him and expected him to carry larger amounts of mail at faster speeds.'
>
> * * *
>
> "My impressions are as follows:
>
> > '(1) Previous inferior wall myocardial infarction.
> > '(2) Obesity.
> > '(3) Hypercholesterolemia, by history.'
>
> * * *
>
> "In summary, I feel that there is no relationship between this patient's employment and the occurrence of the myocardial infarction. In this particular instance we have a man who is a heavy smoker with an elevated cholesterol, and who had had previous hypertension (it was not present at the time of the infarct). These factors certainly were sufficient to have caused an acute myocardial infarction irrespective of his employment history. The actual event occurred at a time when he was sleeping and had not been employed for several hours prior to the onset of the event. In other words, I think this attack might have occurred under any circumstances irrespective of his employment."

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[3] Dr. Wolfe's discharge summary indicated that appellant had smoked one and a half packs of cigarettes a day for 14 years. If appellant had been smoking since the sixth grade, as Dr. Overy's report indicates, he would have been smoking for about 26 years, although perhaps not one and a half packs a day.

By compensation order dated May 15, 1986 the Office rejected appellant's claim, finding that Dr. Overy's report constituted the weight of the medical evidence and established that appellant's myocardial infarction was not causally related to factors of his employment.

By letter dated June 11, 1986 appellant, by his attorney, requested a hearing.

Dr. Madrazo then submitted another report, dated October 16, 1986, in which he discussed in detail appellant's history and the conditions of his former employment, and stated:

> "My impressions are: aggravation, exacerbation and acceleration of the progress of a preexisting arteriosclerotic heart condition by the surrounding work conditions [which] directly led to causing the myocardial infarction of February 8, 1984.
>
> * * *
>
> "On his case the extreme physical demands of the work load and overtime, 28 hours in the last two weeks, extra bag weight, combined with the work conditions resulting from the perceived harassment [by] the supervisors, created a stressful condition which aggravated an underlying disease which served to accelerate its progress and caused the infarction. The physical and emotional state of the patient and the surrounding work conditions, particularly in the last six weeks, were directly causative of the myocardial infarction.
>
> "The fact that the acute onset occurred at night is not an unusual event, since coronary arterial spasm can precede acute thrombotic occlusion by several hours. * * *"

On May 5, 1987 a hearing was held before an Office hearing representative. Appellant appeared with his attorney and testified regarding the employment conditions which he alleged caused his myocardial infarction. He also indicated, through his attorney, that he felt he could return to work and that he wanted his job back.

In a decision dated August 7, 1987, finalized the same day, the hearing representative affirmed the Office's previous decision, finding that although Dr. Timmis' reports "clearly support" an employment relationship, the doctor could not be treated as an impartial medical specialist because he was not selected by the Office according to its procedures,[4] as Dr. Overy was, so that Dr. Overy's report constituted the weight of the medical evidence and established that appellant's myocardial infarction was not causally related to factors of his employment.

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[4] The hearing representative cited *Nancy E. Woodruff,* Docket No. 87-827 (issued June 17, 1987) for this proposition.

The Board finds that the case is not in posture for decision.

To resolve a conflict in the medical opinion between Dr. Madrazo and the Office medical consultant, the Office referred appellant to Dr. Gordon, a Board-certified internist of professorial rank specializing in cardiovascular disease.[5] However, for unspecified reasons, Dr. Gordon's associate, Dr. Timmis, also a Board-certified internist of professorial rank specializing in cardiovascular disease, performed the evaluation and submitted a report. Dr. Timmis discussed appellant's history, his findings on examination and the medical evidence, and concluded that the "physical and emotional stress [appellant] endured for the three weeks prior to his myocardial infarction, while not intrinsically etiologic, may have clearly contributed to the final acute event."

By letter dated July 9, 1986 the Office requested that Dr. Timmis clarify his opinion "regarding the issue . . . whether factors of [appellant's] employment were directly or indirectly responsible for the myocardial infarction." In response, Dr. Timmis indicated in a report dated July 19, 1985 that job-related influences contributed to [appellant's] myocardial infarction, and explained, "There is . . . no question that . . . the delicate supply-demand relationship reflecting heart muscle demands for nourishment and the marginal capacity of diseased coronary arteries to supply it can be disturbed by emotional stresses of the type to which [appellant] felt he was exposed in the three weeks immediately preceding his coronary event."

The Office medical consultant reviewed Dr. Timmis' report and opined that the doctor's opinion was "highly speculative," and that he disagreed with it. The Office determined that Dr. Timmis' supplemental report was not sufficient to clarify his original opinion; and referred appellant to Dr. Overy, a Board-certified internist of professorial rank specializing in cardiovascular disease, for a second impartial evaluation.

The Board finds that, contrary to what the Office determined, Dr. Timmis' reports are sufficiently clear on the issue of causal relationship and that it was improper for the Office medical consultant whose report created the conflict in the medical opinion to review Dr. Timmis' reports; another Office medical adviser should have reviewed the reports.[6] It was also improper for the Office to refer appellant to another impartial specialist based on the Office medical consultant's statements that Dr. Timmis' opinion was "speculative" and that Dr. Timmis' reports were not sufficiently clear to resolve the conflict in the medical opinion. As the Board held in *Carlton Owens* [7] and *Arthur Stockel,*[8] the Office should not refer a case to another impartial specialist where the first impartial specialist's report is sufficient to resolve the conflict in the medical opinion, simply because an Office medical adviser disagrees with the impartial specialist's report. Such action is open to the suspicion that the Office was "shopping around" for a medical opinion it wanted. As noted above, Dr. Timmis' reports are of sufficient clarity to have resolved the conflict in the medical opinion. It was therefore improper for the Office to refer appellant to another impartial specialist for the reason that the reports were not sufficiently clear. As the Board held in *Owens* and *Stockel,* such improperly secured reports must be excluded from the record.[9]

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[5] In situations where there exist opposing medical reports of virtually equal weight and rationale, the case should be referred to an impartial specialist pursuant to section 8123(a) of the Federal Employees' Compensation Act to resolve the conflict in the medical opinion evidence. 5 U.S.C. section 8123(a). *See e.g.*, *Martha A. Whitson (Joe D. Whitson)*, 36 ECAB 370 (1984).

The Board would normally reinstate Dr. Timmis' report as representing the weight of the evidence and grant appellant benefits in this case but is precluded from doing so because Dr. Timmis was not selected as an impartial medical specialist according to Office procedures[10] specifically Dr. Timmis was an associate of the physician selected by the Office to serve as an impartial specialist.

On remand the Office should refer appellant, along with a statement of accepted facts and the medical evidence with the exception of Dr. Overy's report,[11] to an impartial medical specialist selected according to the Office's procedures, for a resolution of the conflict in the medical opinion on the issue whether appellant's myocardial infarction on February 8, 1984 was causally related to stressful factors of his employment. After such further development as the Office finds necessary, it should issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated August 7, 1987 is hereby set aside, and the case remanded for further proceedings in accordance with this decision of the Board.

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[6] *See John W. Slonaker,* 35 ECAB 997, 1011 (1984). *See also Carol J. Jackson,* 37 ECAB 641 (1986); FECA Bulletin No. 85-39 (July 5, 1985).

[7] *See Carlton Owens,* 36 ECAB 608 (1985).

[8] *See Arthur Stockel,* 36 ECAB 643 (1985).

[9] See notes 7 and 8, *supra.*

[10] *See John W. Slonaker,* 35 ECAB 997, 1011 (1984). *See also Carol J. Jackson,* note 5 *supra*; FECA Bulletin No. 85-39 (July 5, 1985).

[11] Dr. Timmis' reports should not be excluded from the record because they were not "improperly obtained" by the Office as Dr. Overy's report was. Although they cannot be used to resolve the conflict in the medical opinion, they should remain part of the medical evidence to be reviewed by the impartial medical specialist.

In the Matter of SHIRLEY A. JACKSON *and* U.S. POSTAL SERVICE, POST OFFICE, North Suburban, Ill.

Docket No. 87-472; Submitted on the Record;
Issued February 26, 1988

Before MICHAEL J. WALSH, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing under 5 U.S.C. section 8124(b)(1).

This case has previously been on appeal, and the Board's decision and order dated August 13, 1985 [1] sets forth the facts and history of the case up to that date. The Board found that the Office of Workers' Compensation Programs met its burden of terminating appellant's compensation effective June 10, 1982 with the evaluation provided by Dr. John R. Fisk, a Board-certified orthopedic surgeon, who found "no objective evidence of orthopedic problems." [2]

By letter dated February 10, 1986 appellant requested reconsideration. She submitted a January 30, 1986 report from Dr. James A. Hill, a Board-certified orthopedic surgeon, who stated a diagnosis of "central herniation of L5-S1." Dr. Hill related a history of appellant having low back pain since her December 14, 1981 employment injury, however, he did not state an opinion on whether the diagnosed condition was causally related to the 1981 injury.

Dr. Vipinchandra K. Shah, a general practitioner, submitted a February 27, 1986 report, in which he stated that due to the fall down the stairs on December 14, 1981 appellant developed a central disc herniation with stenosis at L4-L5 and L5-S1. Dr. Shah stated that appellant was unable to work at that time.

An Office medical adviser reviewed the case record on April 14, 1986 and concluded that the medical evidence was not sufficient to establish a causal relationship between appellant's condition and the December 14, 1981 injury.

Appellant subsequently submitted an April 28, 1986 report from Dr. Shah which related appellant's fall on the stairs at home on

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[1] Docket No. 85-1186.

[2] The Board thereby affirmed the Office's May 24, 1984 and March 27, 1985 decisions. Accompanying each decision the Office informed appellant of her right to a hearing if requested "within 30 days after the date of the decision" and if requested "before reconsideration under section 8128(a)"; the right to request reconsideration at any time; and the right to appeal the Office's decision to the Board if she believed all available evidence had been previously submitted to the Office.

July 28, 1982 to an "original left knee injury in 1974." The doctor stated that appellant's fall in 1982 occurred when "her left knee gave away."

By compensation order dated May 15, 1986 the Office again rejected appellant's claim on the basis that the additional evidence submitted was insufficient to warrant modification of its prior decision. The Office also informed appellant of her right to request reconsideration at any time if she had new pertinent evidence, and her right to an appeal before the Board if she believed all available evidence had been submitted.

By letter dated June 24, 1986 appellant requested a hearing before an Office hearing representative.

By letter decision dated September 23, 1986 the Office rejected appellant's hearing request on the ground that by requesting reconsideration of the Office's initial decision she had waived her right to a hearing pursuant to 5 U.S.C. section 8124(b)(1). The Office further stated the following:

> "Your request for hearing dated June 24, 1986, has been considered and must be respectfully denied inasmuch as the request was made subsequent to the Office's decisions of April 14, 1983, March 27, 1985, May 15, 1986, denying modification of the prior order dated December 17, 1982, and the Act only provides for a hearing before reconsideration under section 8128(a)."

The Board finds that the case is not in posture for decision.

Section 8124(b)(1) of the Federal Employees' Compensation Act provides as follows:

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary. * * *"[3]

The Office's procedures implementing this section of the Act are found in Chapter 2-1601 of the Federal (FECA) Procedure Manual. Paragraph 4 of this Chapter, which concerns the preliminary review of a case by an Office hearing representative to determine whether the hearing request is timely and whether the case is in posture for a hearing, states in pertinent part as follows:

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[3] 5 U.S.C. section 8124(b)(1).

> "If the request was not timely or reconsideration preceded the hearing request, the Branch [of Hearings and Review] will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant, with the reasons." [4]

In the instant case appellant's hearing request was made after reconsideration under section 8128 and appellant therefore is not entitled to a hearing. The Office, however, denied appellant's request on the grounds that "the request was made subsequent to the Office's decisions . . . denying modification of the prior order . . . and the Act only provides for a hearing before reconsideration under section 8128(a)." The Office failed to follow its procedures which require that when a hearing request is untimely or is made after reconsideration the Office must exercise its discretion and determine whether a discretionary hearing should be granted and if not granted, advise the claimant and provide a statement of reasons. The Office failed to exercise its discretion in determining whether to grant appellant a hearing despite her having no entitlement to a hearing since her case had previously been reconsidered under section 8128(a) of the Act.

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[5] Specifically, the Board has held in *Carl M. Deneen* that the Office has the discretion and must exercise its discretion to grant or deny a hearing request when made after reconsideration.[6]

Since the Office did not exercise its discretion to grant or deny appellant's hearing request, the case will be remanded to the Office for it to exercise its discretion whether to grant appellant a hearing. If the Office, within its discretion, denies appellant's hearing request, it should thereafter issue a *de novo* decision on the merits of appellant's claim in order to protect her appeal rights.

The September 23, 1986 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded to the Office's Branch of Hearings and Review for it to properly exercise its discretion whether to grant appellant a hearing and to issue a *de novo* decision thereon,[7] and for any further proceedings consistent with this decision.

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[4] Federal (FECA) Procedure Manual, Chapter 2-1601, paragraph 4.

[5] *Johnny S. Henderson*, 34 ECAB 216 (1982).

[6] *Carl M. Deneen*, Docket No. 86-563 (issued January 29, 1987); *Judith M. Friedman*, Docket No. 86-2204 (issued February 20, 1987).

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[7] *Marilyn W. Daniel*, Docket No. 86-1823 (issued February 27, 1987).

In the Matter of John Keller *and* U.S. Postal Service, Post Office, Edison, N.J.

Docket No. 88-191; Submitted on the Record;
Issued February 26, 1988

Before George E. Rivers, David S. Gerson, Michele von Kelsch

The issue is whether appellant has more than a seven percent permanent impairment of the left arm.

On March 4, 1982 appellant, then a 49-year-old letter carrier, filed a claim for an injury to his left elbow and forearm sustained on March 1, 1982 when his postal vehicle started with a jerk and he attempted to catch falling mail trays. Appellant was examined by an employing establishment physician on March 4, 1982 who restricted him to light duty with no lifting of more than five pounds with the left arm for five days. This physician again examined appellant on March 9, 1982 and declared him not fit for duty for two days.

Appellant stopped work on March 10, 1982 and received continuation of pay for March 10 and 11, 1982. He returned to his regular work on March 12, 1982.

In an April 23, 1982 report Dr. Herbert Bloom, a Board-certified surgeon, found a full range of shoulder elevation and of elbow movement, and diagnosed "Possible pronator teres syndrome." Dr. Bloom referred appellant to Dr. Joseph P. Leddy, a Board-certified orthopedic surgeon, for a second opinion. In a June 10, 1982 report Dr. Leddy stated that appellant had a pronator syndrome. In a July 22, 1982 report Dr. Leddy stated that appellant's condition since he was first seen in June 1982 was worsening. In an October 28, 1982 report Dr. Leddy stated that appellant's symptoms were worsening, that he had difficulty lifting, that he had weakness on examination, and that surgery was needed.

In a January 20, 1984 letter appellant claimed he had a permanent impairment of his left arm and hand.

The Office of Workers' Compensation Programs, by an October 11, 1984 letter, referred appellant to Dr. Leddy for an evaluation of any permanent impairment of his left arm, but was advised that Dr. Leddy did not perform such evaluations.

On October 31, 1984 the Office referred appellant to Dr. Bloom for an evaluation of any permanent impairment of his left arm. In a November 19, 1984 report Dr. Bloom noted appellant's complaints of lack of strength in the thumb and left index fingers, and occasional slight pain in the left shoulder or elbow when driving. On examination Dr. Bloom reported no deformity or atrophy about the shoulders, arms, forearms or hand, full elevation of the arms at the shoulders, normal reflexes, no sensory deficit about the hand or wrist, and apparent weakness of the interphalangeal joint of the left thumb, the distal interphalangeal joint of the index finger, and the left elbow. Dr. Bloom diagnosed "possible pronator teres syndrome," and estimated that appellant had a five percent permanent impairment of the left forearm.

In an October 30, 1984 report Dr. Leddy stated that measuring appellant's disability was almost impossible, that his condition was permanent and stationary, and that his examination showed only tenderness, mild weakness, and pain.

In a January 31, 1985 report Dr. Bloom stated that on examination there was no deformity and no tenderness about the left shoulder, that appellant had full motion of his shoulders but with pain on elevation of the left arm and grating more on the right than the left, and the same apparent weaknesses as noted in his November 19, 1984 report. Dr. Bloom diagnosed "possible impingement syndrome," and stated:

> "The cause of the patient's shoulder pain is not clear. The patient has no objective abnormalities. It is not felt that more aggressive evaluation is indicated. Patient states that the pain is not severe."

Appellant submitted an April 9, 1985 report from Dr. Max M. Novich, a Board-certified orthopedic surgeon, which set forth appellant's history and his complaints of pain and decreased strength and grip. On examination Dr. Novich reported a 10 degree loss of left shoulder elevation and a 15 degree loss of sideward raising both with pain, loss of motion at the left wrist, a weak thumb and index pinch, and no reflex or sensory changes. Dr. Novich diagnosed "Residuals chronic pronator teres syndrome with median nerve neuritis and secondary changes in the left shoulder and elbow joint," and stated that appellant's "disability" was "25 percent of total."

An Office medical adviser applied the American Medical Association's (AMA) *Guides to the Evaluation of Permanent Impairment* to assign a percentage of impairment to each loss of motion of the shoulder and wrist reported by Dr. Novich. Combining these percentages, this Office medical adviser concluded that appellant had a six and one-half percent permanent impairment of the left arm.

On July 5, 1985 the Office issued appellant a schedule award for a seven percent permanent loss of his left arm.

Appellant requested a hearing. By a decision dated November 8, 1985 an Office hearing representative vacated the schedule award on the basis that there was a conflict of medical opinion on the degree of permanent impairment of appellant's left arm, necessitating referral to an impartial medical specialist for resolution.

On January 28, 1986 the Office referred appellant, the case record and a statement of accepted facts to Dr. Mark S. Feierstein, a Board-certified orthopedic surgeon, for resolution of the conflict on the degree of impairment of his left arm. In a February 28, 1986 report Dr. Feierstein set forth appellant's history and his complaints of left shoulder discomfort exacerbated by lifting and motion, forearm discomfort and tenderness exacerbated by use, and dysfunction of the hand including weakness and numbness in the index, long finger and thumb. On examination Dr. Feierstein reported generalized weakness of the left upper extremity, some pain with shoulder motion, mild tenderness over the extra-articular portion of the biceps tendon, full left elbow motion, tenderness along the course of the median nerve, an "equivocal" sensory pattern, "perhaps a half grade of weakness of the median nerve innervated intrinsics," and "weakness of the index profundus, the flexor pollicis longus and the profundus to the long finger as well." Dr. Feierstein diagnosed "chronic compression of the left median nerve including the sensory and anterior interosseous division."

A second Office medical adviser reviewed the medical evidence on May 16, 1986 and stated that Dr. Feierstein's examination did not show any of the limitation of motion upon which the schedule award was based. This Office medical adviser assigned one percent for pain on movement of the shoulder, one percent for tenderness at the elbow, and two percent for weakness and sensory loss in the hand, for a total of four percent permanent impairment of the left arm.

By a May 22, 1986 letter the Office asked Dr. Feierstein to provide a date of maximum improvement and an estimate of the percentage loss of use of appellant's left arm.

By a compensation order dated August 12, 1986 the Office found that, based on an Office medical adviser's evaluation of Dr. Feierstein's findings, appellant had no more than the seven percent permanent impairment of the left arm for which he received a schedule award.

Appellant requested a hearing. By a decision dated May 6, 1987 an Office hearing representative vacated the Office's August 12, 1986 compensation order on the basis that the element of pain was not considered in establishing the percentage of permanent impairment of appellant's left arm.

A third Office medical adviser reviewed the medical evidence on May 26, 1987 and assigned the following percentages of impairment to Dr. Feierstein's findings: one percent for pain on lifting, two percent for pain and sensory changes (five percent of the maximum 40 percent allowed by the AMA *Guides* for the median nerve) and three and one-half percent for motor weakness (ten percent of the maximum 35 percent allowed for the median nerve). Combining these percentages this Office medical adviser concluded that appellant had a seven percent permanent impairment of the left arm, and stated that the losses of motion reported by Dr. Novich were not confirmed by the examinations of Drs. Bloom, Leddy, or Feierstein.

By a compensation order dated June 12, 1987 the Office found that appellant had no more than a seven percent permanent impairment of the left arm.

Appellant requested reconsideration, contending that the Office had not used Dr. Feierstein's report in computing his permanent impairment.

By a compensation order dated August 21, 1987 the Office found that the additional evidence was not sufficient to warrant review of its prior decision.

The Board finds that the case is not in posture for a decision on the percentage of permanent impairment of appellant's left arm.

The opinion of Dr. Feierstein, as that of an impartial medical specialist, is entitled to special weight.[1] Dr. Feierstein's report, however, is not sufficient to determine the percentage of permanent impairment of appellant's left arm. A schedule award is not payable until maximum improvement is reached,[2] and Dr. Feierstein did not indicate that appellant's condition had reached maximum improvement. In addition, Dr. Feierstein's report did not contain an estimate of the percentage of impairment, as required by the Office's procedure manual.[3] An Office medical adviser applied percentages of impairment to the impairments reported by Dr. Feierstein, but did not adequately explain some of the calculations. In particular, the Office medical adviser did not provide an explanation for selecting the lowest value in the range of percentages allowed by the grading scheme and procedure for determining impairment of affected body part due to pain, discomfort, or loss of sensation,[4] or provide an explanation for selecting 10 percent, a value toward the lower end of the range of percentages allowed by the grading scheme and procedure for determining impairment of affected body part due to loss of strength.[5] While the Board recognizes that the selection of these percentages from the allowable range involves a subjective judgment, an Office medical adviser, as a nonexamining physician, cannot select a percentage without any explanation or reference to the examining physician's findings. Such arbitrary selection precludes the Board from making an informed determination of the propriety of the Office medical adviser's calculation of the permanent impairment.

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[1] *James P. Roberts*, 31 ECAB 1010 (1980).

[2] *Leamond Leon Carver*, 27 ECAB 397 (1976).

The decision of the Office of Workers' Compensation Programs dated June 12, 1987 is set aside and the case remanded to the Office for it to obtain a supplemental report from Dr. Feierstein addressing the date of maximum improvement and calculating the impairment of appellant's left arm in accordance with the tables of the AMA *Guides*. After such further development as it deems necessary, the Office should issue a *de novo* determination of the percentage of impairment of appellant's left arm.

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[3] The Federal (FECA) Procedure Manual, Chapter 2-808, Schedule Awards and Permanent Disability Claims (August 1985) states at paragraph 5(e) that the report of the evaluating physician "must always include" an estimate of the impairment in terms of percentage, and where this is missing, provides that the claims examiner may ask the physician to provide it, and if it is not provided may ask an Office medical adviser to calculate the percentage.

[4] AMA *Guides*, Chapter 2, Table 4 provides a range of five to 25 percent of the value of the affected nerve for a grade 2 impairment.

[5] AMA *Guides*, Chapter 2, Table 5 allows five to 20 percent of the value of the affected nerve for a grade 2 impairment.

In the Matter of ANNABELLE SHANK *and* VETERANS ADMINISTRATION, VETERANS ADMINISTRATION CENTER, Dayton, Ohio

Docket No. 87-1579; Submitted on the Record;
Issued February 26, 1988

Before GEORGE E. RIVERS, DAVID S. GERSON, MICHELE VON KELSCH

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's disability causally related to her September 3, 1977 employment injury ended by June 8, 1986.

On September 3, 1977 appellant, then a 61-year-old food service worker, filed a claim for bruised knees sustained on that date when she slipped and fell onto both knees.

On September 6, 1977 appellant was examined by Dr. Russell Fiel, an osteopath, who in a September 21, 1977 report noted ecchymosis of the medial portion of her patella, reduced flexion and extension, and tenderness over the medial meniscus of the right knee, and indicated appellant was totally disabled. Dr. Fiel referred appellant to Dr. T.M. Kramer, an osteopath specializing in orthopedics, who in an October 19, 1977 report noted, among other findings, "atrophy noted of the vastus medialis obliquus by palpation, although not visible when the patient extended her knees, due to a lack of muscle development of both distal quadricep mechanisms, right and left legs." Dr. Kramer diagnosed "internal derangement of the right knee with the probability of medial meniscal tear with the possibility of capsular injury of the medial capsule with some evidence of medial rotatory instability," and recommended "arthrotomy of the right knee with excision of torn medial meniscus and if necessary medial reconstruction."

Appellant received continuation of pay from September 7 to October 21, 1977 after which the Office of Workers' Compensation Programs began paying her compensation for temporary total disability.

In a December 1, 1980 report Dr. Fiel stated that appellant had refused surgery on her right knee, that on July 31, 1980 appellant complained of pain in the left knee and stated that the right knee had "buckled" and that she fell striking the left knee, that on examination at that time there was some swelling around the knee joint and a ten percent restriction of extension, that on August 18, 1980 her right knee buckled again and she fell striking the left knee, that at that time she had considerable swelling, acute tenderness over the medial meniscus, and 25 percent restriction of flexion and extension of the left knee. Dr. Fiel stated that the x-ray studies, the results of which he described, and appellant's physical examination were "compatible with a torn medial meniscus of the left knee," and that she had "a total permanent disability due to knee injuries and since surgery seems to be ruled out, the prognosis is poor."

On May 19, 1981 the Office referred appellant, the case record, and a statement of accepted facts, to Dr. Robert Po, a Board-certified orthopedic surgeon, for an evaluation of the condition of her knees and its relation to her employment injury. In a June 5, 1981 report Dr. Po set forth appellant's history which included two episodes of her knees buckling while standing at home on August 31, 1980 and in September 1980, resulting in left knee injuries, and described his findings on physical examination as intact ligaments, no effusion, no evidence of a torn medial meniscus, and flexion to 120 degrees bilaterally. Dr. Po diagnosed mild arthritis of the medial compartments of the knees, and stated that appellant had subjective symptoms of pain, weakness, giving way of the knees, and numbness of the left leg and foot, that she had preexisting conditions of obesity and arthritis of the knee, that "any permanent disabling injury residuals would be quadriceps muscle atrophy from poor muscle tone, inadequate muscle rehabilitation and poor motivation," that both her quadriceps muscles measured the same and were equally weak, and:

> "My opinion as to the relationship of [appellant's] injury on September 3, 1977 to the conditions found is aggravation. I consider the falls of July and August of 1980 did result from the fall of 1977 due to poor musculature development of her quads, pain and history of giving way.
>
> "A preexisting condition was aggravated and the aggravation was considered to be temporary. The approximate time at which aggravation ceased would have been six months to one year from the time of the last injury."

An Office medical adviser reviewed the medical evidence on July 24, 1981 and expressed agreement with Dr. Po's opinion that appellant's arthritis of the knees was temporarily aggravated by her employment injury, and stated that Dr. Po was generous in allowing six months for maximum improvement and that meniscectomy was not the preferred treatment for elderly patients with torn menisci unless there was recurrent effusion, locking or osteochondral fracture.

In an April 22, 1983 report Dr. Fiel stated that appellant's back and knee injuries resulted in her being permanently totally disabled for work.

On June 1, 1983 the Office referred appellant, the case record, and a statement of accepted facts to Dr. Thomas P. Matrka, a Board-certified orthopedic surgeon, for an evaluation of her condition and to resolve the conflict as to its relation to her employment injury. In a June 23, 1983 report Dr. Matrka set forth appellant's history which included persistent difficulty with the right knee since her September 1977 employment injury, and at a later date "she was standing when pain in her right knee caused her to suddenly fall, striking her left knee. Since that time, the patient states that she has similar symptoms of discomfort in the bilateral knees." On examination Dr. Matrka found no effusion or deformity of the knees, bilateral motion from zero to 115 degrees, stability on valgus and varus stressing, ability to ambulate well without the cane she brought, and on x-ray slight decrease in the medial joint spaces more significant on the right. Dr. Matrka stated that appellant had "very minimal degenerative joint disease" of the knees and a "chondromalacia patellae-like syndrome," and that her history and his examination did not present good evidence for a meniscal tear, explaining that "A torn cartilage generally does not produce such persistent, unrelenting pain such as the patient described. Nor would it cause giving away, when the patient was stationary. Routine tests for such a lesion were not remarkable at the time of this office visit. I feel the patient's current symptoms are primarily due to the lack of exercise and general inactivity she has experienced over the past years." Dr. Matrka concluded:

> "In terms of causation and disability, I feel the accident on September 3, 1977 was the cause of the right knee symptoms. I feel the disability associated with this, would restrict the patient from strenuous work and excessive ambulation. I feel she is fully employable in a sedentary role, in light of this knee alone. I feel that this knee was not the cause of the injuries to her left knee in 1980. Even if there were a torn cartilage on the right, one does not develop a disability which would cause a fall while standing in one position, as the patient described

> to me. Even if one were to fall, this type of fall generally does not produce significant knee injuries such as a torn cartilage."

A second Office medical adviser reviewed the medical evidence and expressed agreement with Dr. Matrka's report, stating "This fall [on September 3, 1977] in all likelihood resulted in injury to the right patella and eventually produced, in part, her symptoms of chondromalacia patella. Her left knee was not nearly as symptomatic and probably not related to her work injury." This Office medical adviser calculated that appellant had a 22.5 percent permanent impairment of both knees based on her range of motion and chondromalacia, and stated that this was reasonable for the right knee but should not be given for the left, and that it was not unreasonable to have ongoing symptomatic treatment for the right knee but that the Office should not be responsible for the left knee.

On April 17, 1984 a third Office medical adviser reviewed the medical evidence and stated that Dr. Matrka's opinion that the condition of appellant's right knee would not cause her to fall from a standing position and that such a fall would not cause injury to the knee was speculative, that the best medical report in the record was that of Dr. Po, and "At present I do not see any work-related disability."

On August 17, 1984 the Office referred appellant to Dr. Brady Randolph, a Board-certified orthopedic surgeon, for an evaluation of her condition and its relation to her employment injury. Appellant did not keep her appointment with Dr. Randolph because she was hospitalized for conditions unrelated to her knee injury.

On July 15, 1985 the Office referred appellant, the case record, and a statement of accepted facts to Dr. Anthony G. Kokenakis, a Board-certified orthopedic surgeon, to resolve a conflict of medical opinion between Drs. Fiel and Po.

In a September 10, 1985 report Dr. Fiel stated that appellant's September 3, 1977 fall caused internal derangement and a torn medial meniscus of the right knee, and that her July 31, 1980 and August 18, 1980 falls resulting from her right knee giving way caused internal derangement and a torn medial meniscus of her left knee, and that she would never be able to return to any type of work duties.

Following its receipt of an August 23, 1985 report and a February 13, 1986 clarifying report from Dr. Kokenakis, the Office, by a compensation order dated May 7, 1986 found, "It has been established by the weight of the specialist's medical evidence that work-related disability has ceased" and terminated appellant's compensation on June 8, 1985.

By a November 7, 1986 decision the Office determined that appellant was not entitled to a schedule award on the basis that there was no evidence to establish that her injuries resulted in a permanent impairment.

Appellant requested reconsideration, and submitted a June 9, 1986 report from Dr. Aivars Vitols, an osteopath. In this report Dr. Vitols set forth the history of appellant's September 3, 1977 injury, described his findings on physical examination which included laxity of the medial collateral system and effusion of both knees, and stated:

> "It is my professional opinion that this patient presents with post-traumatic degenerative joint disease confined to the medial compartment on the right as well as the left knees, with the right being slightly worse. As to the question of preexisting arthritic condition, not having the availability of previous x-rays, but only reading the reports, this may well be true. However, if there was preexisting arthritis, it was asymptomatic and I would consider it to be normal for an individual of her age and certainly the trauma which she reports would have directly caused her present condition."

By compensation order dated June 25, 1987 the Office found that the additional evidence was not sufficient to warrant modification of its prior decision.

The Board finds that the Office improperly determined that appellant's disability causally related to her September 3, 1977 employment injury ended by June 8, 1986.

As noted in the Office's letter referring appellant to Dr. Kokenakis, there was a conflict of medical opinion between Dr. Fiel and Dr. Po on the issue of whether appellant continued to be disabled as a result of her September 3, 1977 employment injury. To resolve this conflict the Office referred appellant to Dr. Matrka, a Board-certified orthopedic surgeon. Dr. Matrka's June 23, 1983 report was to some extent internally inconsistent and did not provide medical rationale for the doctor's opinion that appellant's September 3, 1977 employment injury was the cause of her disabling right knee symptoms in June 1983, and for these reasons was not sufficient to resolve the conflict.

It was improper, however, for the Office to refer the case to Dr. Randolph and to Dr. Kokenakis as a second impartial specialist without first requesting a supplemental, clarifying report from Dr. Matrka. Such a referral was improper whether based on the disagreement of the third Office medical adviser with Dr. Matrka's opinion [1] or on the lack of rationale and the inconsistency in Dr. Matrka's report.[2] As Dr. Matrka's report was favorable to appellant, the Office's action is open to the suspicion that the Office was shopping around to secure a medical opinion favorable to its view.

In a situation where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report. Unless the above-mentioned procedure is carried out by the Office, the intent of section 8123(a) [3] of the Federal Employees' Compensation Act will be circumvented when the impartial specialist's medical report is not sufficient to resolve the conflict of medical evidence.[4]

Dr. Randolph did not submit a report, but the report from Dr. Kokenakis will not be given any weight on review by the Board, as it was improperly obtained. This action is consistent with the Board's ruling in the case of *Carlton L. Owens* in which the Board found that medical reports improperly obtained by the Office would not be given weight on review by the Board. To allow these reports to be weighed on appeal would circumvent the Board's established line of precedent that the Office must attempt to secure a supplemental report from an impartial specialist before referring the case to a second impartial specialist.

On remand the Office should prepare an augmented statement of accepted facts to include a detailed description of appellant's alleged consequential injuries on July 31, 1980 and August 18, 1980. The Office should submit this statement of accepted facts and the case record to Dr. Matrka with a request for a supplemental report providing rationale for his statement that her employment injury was the cause of her disabling symptoms when seen in June 1983, and reconciling this statement with his statement that her "current symptoms are primarily due to the lack of exercise and general inactivity she has experienced over the past years." Following such further development as it deems necessary, the Office should issue a *de novo* decision.

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[1] *Carlton L. Owens*, 36 ECAB 608 (1985).

[2] *Queenie Anderson*, 37 ECAB 661 (1986).

[3] 5 U.S.C. section 8123(a) states in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.

[4] *Audray Unice Bogan*, 35 ECAB 187 (1983).

The decision of the Office of Workers' Compensation Programs, dated June 25, 1987, is set aside and the case remanded to the Office for further action in accordance with this decision of the Board.

In the Matter of CLIFFORD C. LARSON *and* DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, OFFICE OF CHIEF COUNSEL, Los Angeles, Calif.

Docket No. 87-1704; Submitted on the Record;
Issued February 29, 1988

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined appellant's loss of wage-earning capacity for the period beginning March 1, 1982 and (2) whether appellant is entitled to augmented compensation for dependents under 5 U.S.C. section 8110.

On October 21, 1981, appellant then a 42-year-old trial attorney, filed a claim for compensation for acute or chronic anxiety, high blood pressure and diabetes mellitus. He stated that he was unable to cope with the demands of his duties which included trial or settlement of cases in the U. S. Tax Court, collection matters and review of prosecution recommendations. He claimed that since 1975 he had carried a constantly increasing caseload. He indicated that he stopped working on September 16, 1981.

Appellant submitted a copy of a September 23, 1981 report from Dr. Braverman. Dr. Braverman stated that appellant had an obsessive-compulsive personality. The doctor indicated, however, that the continuous pressure of increasing work and additional responsibilities resulted in a breakdown of appellant's work performance with associated feelings of self-doubt and uncertainty. Thereafter, a variety of psychophysiologic symptoms appeared including hypertension, gastrointestinal symptoms, rashes, and possible aggravation of the diabetic condition. Dr. Braverman also indicated that appellant had a chronic persistent anxiety state and depression because of feelings of helplessness in view of the work burden imposed on him. Dr. Braverman diagnosed industrial stress followed by post-traumatic psychiatric effects including anxiety, depression and psychophysiologic response which resulted in severe work disability. He also diagnosed longstanding obsessive-compulsive personality with underlying passive-aggressive features. He stated that appellant, from a medical psychiatric point of view, was not considered capable of working.

In a March 17, 1982 report, Dr. Braverman noted that appellant was considering an office practice in areas involving tax, estate planning and probate, beginning March 1, 1982. Dr. Braverman stated that appellant was competent to do that work and was able to maintain a client relationship. He concluded that appellant would be able to function in an office practice with the continuing help of psychotherapeutic care.

In a January 10, 1984 decision, the Office of Workers' Compensation Programs rejected appellant's claim on the ground that he had failed to discharge his burden of proof.

In a February 7, 1984 letter appellant requested a hearing before an Office hearing representative. In a February 7, 1984 statement and at a June 11, 1984 hearing, appellant described in detail his caseload which rose from 70 to 80 active general litigation cases and three to four criminal cases in 1969 to 100 to 120 general litigation cases and 90 to 100 Tax Court cases in 1978. He discussed several of the more complicated tax cases he worked on at the employing establishment. He stated that he was required to spend a great amount of time on Tax Court cases and therefore was unable to work on general litigation. Appellant testified that he had $4,500.00 in earned income in 1982 and $4,000.00 in 1983.

Appellant submitted at the hearing a June 7, 1984 report from Dr. Braverman. Dr. Braverman related that in March or April 1982 appellant went into the practice of law on his own working 20 to 25 hours a week, then entered into a partnership working 25 to 30 hours a week and doing work on a related real estate project. The physician noted that in January 1983 appellant's practice increased to the point where he was working 45 hours a week. He stated that appellant had a very serious compromise in his ability to do his work because of difficulty in concentration, recall, absentmindedness and indecisiveness. He repeated his diagnosis of a post-traumatic reaction with depression, anxiety and psychophysiologic response. He stated that as a consequence of the psychophysiological reaction, appellant had a moderate, partial and permanent work disability.

In a July 11, 1984 decision, the Office hearing representative found that appellant had submitted sufficient evidence on the factors of employment that he believed were responsible for his disability. She therefore set aside the Office's January 10, 1984 decision and remanded the case for further proceedings.

The Office referred appellant's case record and medical reports, together with a statement of accepted facts, to an Office medical adviser for his review. In an April 8, 1985 memorandum, the Office medical adviser stated that several issues in the case needed further clarification. He indicated that further evaluation was needed on whether appellant's medical conditions, combined with a possible preexisting personality disorder, may have been responsible for causing his difficulties at work and the alleged psychological symptoms. He pointed out that appellant's current functional ability needed further development as he was felt to be unable to return to his former job but had been able to practice law independently. He concluded that neither the psychiatric diagnosis, the issue of causal relationship or degree of current disability had been established.

Appellant submitted an April 9, 1985 report from Dr. Braverman. The doctor reported that in early 1982 appellant had begun to work as an independent practitioner 20 hours a week and entered into partnership with a friend in June 1982. Dr. Braverman commented that while appellant continued in that practice, he became increasingly disabled by depression, profound feelings of inadequacy, helplessness and difficulties in cognitive functioning such as problems in concentration, recall and absentmindedness. The doctor indicated that appellant was requested to leave the partnership in November 1984 and had not been receiving any income from the partnership as of January 1935. He stated that although appellant had been trying to work at least 10 hours a week he had not had any further clients. The doctor pointed out that appellant was unable to attract and retain clients due to his depression, loss of confidence and loss of security. He stated that appellant had a multiple diagnosis with a basic diagnosis of post-traumatic psychiatric reaction arising from the emotional trauma of the long-term stress he experienced. He also diagnosed significant depression, anxiety and psychophysiologic response. He stated that appellant had a work disability of 90 percent of the whole man. Dr. Braverman commented that appellant had anxiety and outstanding depression which interfered with his ability to work, causing difficulties with apathy, motivation, motoric retardation procrastination and very low injury levels. The doctor reported that in association with depression, appellant had a very poor self-image with associated loss of confidence and inability to present himself in a favorable strong positive manner to potential clients. Dr. Braverman commented that these factors of disability very seriously impaired appellant's ability to work and that the impairment was progressive. He stated that the level of depression had reached a point where appellant was virtually totally unable to carry out the responsibilities of his work and his association with partners. He concluded that appellant's condition was related to, and entirely the result of, the employment of appellant with the employing establishment.

The Office conducted further development of appellant's claim in an August 27, 1986 letter, the Office accepted appellant's claim for generalized anxiety disorder with depressive features. It indicated that before it could determine the amount of compensation due, it required appellant's tax returns for the years he worked in private practice.

Appellant submitted tax returns which showed that he reported no income from wages in 1982 but had a $10,535.00 income from the partnership of McDonald and Larson with $15,302.00 in partnership expenses. In 1983 appellant reported no income from wages. He indicated that he had $4,000.00 in income from his partnership with $32,903.00 in partnership expenses. In 1984 appellant reported no income from wages. He indicated that he had $28,196.00 income from his partnership with $6,100.00 in partnership expenses. In 1985 appellant had no income from his wages or his partnership.

In a September 8, 1986 form, appellant stated that he was self-employed from March 1982 to December 31, 1984, performing legal research, planning and drafting. He reported that during 1982 and 1983 he worked 10 hours a week or less. He indicated that he was unemployed during 1985 and 1986 to the current time. He reported that he was paid $10,535.00 in 1982 and $4,000.00 in 1983. He stated that during 1984, he borrowed $28,000.00 from the partnership to pay personal expenses. He indicated that the partnership dissolved under the pressure of creditor claim and his debt of $28,000.00 was cancelled which made the $28,000.00 taxable income. Appellant stated that he separated from his wife on August 27, 1986. He noted that child support was not yet defined. He indicated that he claimed additional compensation because of dependents because he was required by law to support his children.

In a November 20, 1986 letter, the Office requested clarification on appellant's income in 1982 and 1983. It also requested a description on appellant's activities in the law partnership, the date he last worked in the law firm and an estimate on the rate of pay that would be paid to someone hired to perform the work that appellant did.

In a November 25, 1986 response, appellant's attorney reported that the partnership was terminated on November 15, 1984. He stated that it was not possible to place an hourly rate on appellant's work. He related that appellant's partner was a business lawyer who agreed to provide appellant with office space so that he could tell clients that there was a tax specialist in the firm. Appellant's attorney indicated that appellant performed some tax work but no invoices were sent to clients. The partner assigned appellant work on a real estate shelter which failed precipitating appellant's termination from the partnership. Appellant's attorney stated that the advances to appellant were in anticipation of the success of the tax shelter. Appellant's attorney reported that asking prices for the hiring of a law clerk or inexperienced attorneys ranged from $25.00 to $50.00 an hour although he had paid as little as $10.00 an hour.

In a February 23, 1987 memorandum, an Office claims examiner indicated that appellant had stopped working in September 1981, was working 20 to 25 hours a week in private practice in March and April, 1982, joined a law partnership in May 1982 and worked 25 to 30 hours a week, increasing to 45 hours a week in January 1983. He noted that appellant's attorney indicated that he had paid law clerk and young attorneys between $10.00 and $50.00 an hour. The claims examiner commented that although appellant was an experienced tax attorney, he had psychiatric difficulties. He recommended that appellant's wage-earning capacity be determined on the basis of a pay rate of $25.00 an hour. He stated that appellant's loss of wage-earning capacity should be changed in January 1983 and November 16, 1984 because he was able to increase from part-time to full-time work in January 1983 and his mental status deteriorated in November 1984.

In a series of decisions issued on February 26, 1987, the Office found appellant was entitled to temporary total disability from September 16, 1981 to February 28, 1982, and was able to work as a tax attorney thereafter for varying hours per week. The Office concluded that appellant could work 25 hours a week from March 1, 1982 to December 31, 1982 and therefore had a 28 percent loss of wage-earning capacity, was able to work forty-five hours a week from January 1, 1983 to November 15, 1984 and therefore had no loss of wage-earning capacity, and was able to work 10 hours a week after November 16, 1984 therefore had a 73 percent loss of wage-earning capacity. The Office reduced the percentage of the difference between appellant's pay rate and his wage-earning capacity which formed the basis of the compensation calculation from 75 percent to 66⅔ percent effective August 27, 1986, the date of his separation from his wife. In a February 26, 1987 letter to appellant's attorney the Office indicated that although he reported that appellant stopped working on November 15, 1984, the medical reports showed that appellant was still working as of June 7, 1985.

In a March 13, 1987 letter, appellant's attorney requested reconsideration. He contended that the period of temporary total disability compensation should be from September 16, to April 30, 1982, at which time appellant entered the law partnership. He argued that appellant was totally disabled for all relevant points in time and was not competent as a tax attorney. He stated that appellant was advanced $2,000.00 a month from May 1, 1982 to October 31, 1982 by his partner and worked no more than 10 hours a week at research planning and drafting. He indicated that appellant began research and planning on the real estate tax shelters in October 1982 but the partnership did not receive any fees from the client for the tax shelter. He reported that appellant was advanced $4,000.00 during December 1983 and was loaned $28,196.00 during 1984 through November 15, 1984 for work on the tax shelter which was terminated when a lawsuit was filed against the law partnership in September 1984. The attorney stated that appellant's tax returns for 1985 and 1986 showed no earnings from the practice of law. He indicated that from September 1984, appellant's "work" consisted of defense appearances to demands, default claims and threatened litigation against appellant and his former partner which did not generate income and resulted in a substantial judgment in 1984, attributable to incompetence. He stated that after August 26, 1986, the only matter of consequence which appellant was "working" on was his wife's petition for divorce, bankruptcy and survival. He stated that since appellant's separation, he had paid $73.00 a month for the care of his son, paid some of his wife's debts and kept his daughter occasionally to accommodate his wife's work. Appellant's attorney contended that the Office erred in valuing appellant's work at $23.00 an hour because it assumed that his work was competent when in fact the work appellant performed resulted in errors and commissions. He contended that the proper conclusion was that the mental damage from the stress of appellant's employment rendered him incompetent to function as a lawyer.

The attorney submitted a March 15, 1987 statement from appellant. Appellant stated that after he stopped working at the employing establishment, he unsuccessfully sought employment with a law firm. He then purchased office furniture and rented office space in a law office. He stated he earned no income in 1981 or 1982 in this venture. He indicated that he entered into a law partnership on May 1, 1982 but generated no business revenue because he was unable to solicit business on his own and his partner did not charge clients for appellant's services. He estimated that he worked no more than 10 hours a week. He indicated that in September 1984 the partnership was sued in regard to the tax shelter. Appellant stated that his partner left appearances, depositions and pleadings arising from the law suit in his hands. He commented that during 1984, 1985 and 1986 he may have acted as a lawyer to deflect or defeat claims against himself or jointly against him, his wife and his partner but received no fees for the work. He indicated that after his separation from his wife, he continued to make payments on her charge and insurance accounts. He reported that since October 26, 1986 he had paid a monthly fee for the care of his son at a state home for retarded or learning disability children. Appellant submitted a copy of the letter assessing the fee and records showing that he was paying the monthly fee. He also submitted a copy of a court order requiring him to pay $200.00 a month in child support for his daughter.

In an April 29, 1987 decision the Office denied appellant's request for modification. The Office stated that the loss of wage-earning capacity was based on appellant's demonstrated capacity to earn wages, the rate of pay of which would be computed on the monetary payment appellant received from any source or, if no money was received, on what it would have cost to perform similar wages or services. The Office stated that appellant's work for the law firm, on the lawsuit and on his wife's petition for divorce showed he was not totally disabled and reflected his ability to earn wages. The Office stated that no new medical evidence was submitted which would establish total disability for the periods identified. It commented that incompetence at practice of law was not considered a valid argument to establish total disability. The Office also found that appellant had not submitted evidence to show that he made regular support payments to his ex-wife for child support.

The Board finds that the Office improperly determined appellant's loss of wage-earning capacity.

Under section 8115 of the Act wage-earning capacity for a partially disabled employee is determined:

"by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances is determined with due regard to:

> "(1) the nature of his injury;
> "(2) the degree of physical impairment;
> "(3) his usual employment;
> "(4) his age;
> "(5) his qualifications for other employment;
> "(6) the availability of suitable employment; and
> "(7) other factors of circumstances which may affect his wage-earning capacity in his disabled condition." [1]

Under section 8115, a determination of a claimant's loss of wage-earning capacity must be based on one of these two methods.[2] In this case, however, the Office did not make a determination on whether appellant's actual earnings fairly and reasonably represented his wage-earning capacity. The Office instead based its determination on what a person working as a tax attorney would have received if he had worked the same hours that appellant had allegedly worked after March 1, 1982. The Office therefore apparently determined that appellant's actual earnings did not fairly and reasonably represent his wage-earning capacity. The Office therefore must, pursuant to section 8115 of the Act, determine his wage-earning capacity with due regard to his injury and physical impairment, his usual employment, his age, his qualifications, and the availability of suitable employment.[3] This the Office did not do. The Office failed to specify the physical requirements of the selected position, failed to establish that appellant was physically or emotionally capable of performing the selected position during the entire period covered by its loss of wage-earning capacity determinations [4] and did not determine whether the selected position was reasonably available in appellant's commuting area at all,[5] even as a part-time position.[6] For these reasons the determination of appellant's wage-earning capacity for the period beginning July 19, 1979 was erroneous.

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[1] 5 U.S.C. section 8115(a).

[2] *See Pope D. Cox*, 39 ECAB 143 (1987).

[3] *Samuel J. Russo*, 28 ECAB 43 (1974).

[4] Although Dr. Braverman indicated in his March 17, 1982 report that appellant was competent to work as a tax attorney, in his April 9, 1985 report, he stated that appellant was virtually totally unable to carry out his responsibilities at work.

[5] *David Smith*, 34 ECAB 409 (1982).

The Board also finds that appellant is entitled for augmented compensation at the 75 percent rate for the period after October 20, 1986 because he had at least one dependent within the meaning of 5 U.S.C. section 8110.

The Office found that appellant was not entitled to augmented compensation after August 26, 1986 because he was separated from his wife who took custody of his children. Under section 8110(a)(3) appellant's children would be considered dependents if they were living with him or if he were making regular contributions to their support. Appellant has submitted evidence that as of October 20, 1986, he was contributing $73.00 a month to the support of his son in paying the charge for his son's attendance at a special school for children with learning disabilities. This constitutes sufficient evidence to show that appellant was making a regular contribution to the support of his son which qualified his son as a dependent.

The decisions of the Office of Workers' Compensation Programs, dated April 29, 1987 and February 26, 1987, are hereby reversed and the case remanded for further action in accordance with this decision.

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[6] *Wordie G. Turner*, 19 ECAB 530 (1968).

In the Matter of THOMAS LINDSEY *and* DEPARTMENT OF THE NAVY, MARE ISLAND NAVAL SHIPYARD, Vallejo, Calif.

Docket No. 87-1268; Submitted on the Record;
Issued Feburary 29, 1988

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether appellant sustained his emotional condition in the performance of duty, as alleged.

On September 10, 1985 appellant, then a 37-year-old welder, filed a notice of traumatic injury and claim for compensation, alleging that he sustained a mental disorder "due to wrongful, prejudicial handling of false charges and the adverse actions imposed onto me." Appellant's employing establishment controverted the claim stating: "The problem seems to have started since [appellant] submitted a fraudulent lodging claim while on duty in New York." Appellant stopped work on August 21, 1985.[1]

In a letter dated October 4, 1985 the Office of Workers' Compensation Programs informed appellant that a claim for traumatic injury was inappropriate, and that he needed to file a claim for occupational illness. On November 3, 1985 appellant filed a claim for occupational illness.

The record reveals the facts allegedly causing appellant's emotional condition as follows:

Appellant began employment at Mare Island Naval Shipyard in Vallejo, California in 1968 where he was promoted from apprentice welder to master welder and in 1979 to nuclear inspector; in 1982 appellant received a "temporary promotion" to ship scheduler.[2] On September 28, 1984 appellant received orders to report to Kesselring Site, West Milton, New York through September 30, 1985. While appellant's orders were only for one year, the record indicates that appellant anticipated remaining in New York for two to four years, or longer.[3]

During the time that appellant was stationed in West Milton, New York he routinely submitted vouchers and receipts for reimbursement for living expenses pursuant to his orders and the expense account permitted to him. These vouchers included expenses for leased premises.

In May 1985 appellant submitted a $725.00 travel voucher, with a receipt, for May rent on a townhouse he was renting while in New York. Although the voucher indicated that appellant had lived in the townhouse for the complete month of May, appellant had only lived in the townhouse for one week, and his landlord had reimbursed him for the last three weeks of the month. At that time appellant was in the process of buying a house to live in while he was stationed in New York and the closing costs and reimbursable expenses for the home exceeded $810.00. As appellant would not have the expenses back in time to submit for his May travel voucher, he submitted the $725.00 voucher for rent to "simplify everything."

The Base Administrative Officer advised appellant's supervisor of inaccuracies on the voucher, and on May 30, 1985 appellant received an order, without any explanation, stating that his temporary services were no longer needed and he was returned to Mare Island Naval Shipyard.[4] The agency subsequently stated that the order was based on the allegations that appellant had filed a fraudulent travel voucher. Appellant's promotion to ship scheduler was terminated effective June 23, 1985 and he returned to his position as welder.

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[1] Appellant was on sick leave from August 21, 1985 through October 21, 1981. On October 22, 1986 appellant went on leave-without-pay status. Appellant resigned effective October 28, 1986.

[2] This temporary promotion was periodically extended. The last such extension was dated October 14, 1984 at which time appellant's promotion from welder to ship scheduler was not to last beyond October 13, 1988.

[3] Appellant alleged that the New York Site Manager told him that his temporary promotion could likely exceed the four year limit.

On October 16, 1985 appellant filed a grievance against management in order to receive an official written determination that he did not engage in any type of misconduct while at West Milton, New York. Appellant's grievance was denied on the grounds that there had been no disciplinary action taken against appellant for filing these travel vouchers. No charges were ever brought against appellant concerning these travel vouchers.

In support of his claim appellant submitted a report dated September 20, 1985 from Dr. Barry Dollar, a clinical psychologist, which stated:

> "The specific work factors contributing to [appellant's] emotional or psychiatric situation are quite simply that he was accused of filing false documentation for living expenses not in the sense of submitting for expenses that were not incurred nor for submitting expenses greater than had been incurred, but in not providing the correct receipts for those expenses. This sudden and dramatic change in his plans and duty assignment created severe emotional distress and incapacitated him from safely performing his job as a welder. . . .
>
> "[Appellant] is limited in his ability to provide concentration to a specific task, therefore increasing his likelihood of accident or injury. [His] mental state ranges between anxiety and anger and [he] is not able to follow directions or complete follow through on a variety of simple tasks at home and I would not predict he would be able to respond to corrective feedback from supervisors or act in a cooperative manner with peers in his current state. In the past [appellant] has been able to respond well to pressure and the stress of deadlines, but at this point, a fixed interval deadline would exaggerate and deteriorate his mental capabilities."

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[4] Appellant had an intimate relationship with the administrative officer which he had broken off. Appellant alleged that she notified his supervisor about the inaccuracies in the travel vouchers as a personal vendetta against him.

Dr. Dollar further noted, in a report dated December 27, 1985, that appellant's condition was worsening, and that this was partly due to his problems in obtaining workers' compensation benefits.

In a letter dated April 2, 1986 the Office informed appellant that it had accepted his claim for adjustment disorder with mixed emotional features. The Office advised appellant that he would be referred to Dr. Barry M. Sugerman, a Board-certified psychiatrist, for an independent medical evaluation to determine the extent of his employment-related disability.

Dr. Sugerman examined appellant on May 7, 1986, and in a report dated May 30, 1986 gave a very thorough review of the incident appellant alleged caused his condition:

> "The statement of accepted facts indicated that [appellant] worked as a Ship Scheduler and on September 28, 1984 received orders to report to the Kesselring Site in West Milton, New York. These orders extended through September 30, 1985.
>
> "Although [appellant] did not argue that he was formally assigned to work at the Kesselring Site for one year, he believed that he would remain in New York for at least four years. [Appellant's] belief that he would be working in New York for an extended period of time played a major role in his decision to purchase a house there. Escrow closed only two days before he was ordered to return to the Mare Island Naval Shipyard in Vallejo . . .
>
> "As the SOAF [Statement of Accepted Facts] indicates, in May of 1985 [appellant] submitted an inaccurate travel voucher. He turned in a rent receipt for a town house, which he only resided in for one week. Although the receipt indicated that he had paid one month's rent, in reality his landlord reimbursed him for the last three weeks. At that time [appellant] was in the process of closing escrow on his own home and he knew that the reimbursable expenses for his home would far exceed the travel voucher limit for the month. The reimbursable expenses included closing costs and taxes on the new home. He was not going to, however, have the receipts for these expenses back in time to submit for his May travel voucher. He knew that what he was doing was technically not correct, but he needed the maximum travel voucher allowance that month. He also reasoned with himself that, although technically incorrect, he was not cheating the Department of the Navy out of funds.

"Sherri Rich was the Base Administrative Officer who reviewed travel voucher submissions. Prior to submitting his May voucher [appellant] discussed his situation with her and wanted to 'see if it was okay without putting her on the spot.' She did not give him a direct answer, but he assumed that there would be no problem.

"The day after submitting the May travel voucher [appellant] was unexpectedly called in to Art Rust's office and was questioned about his travel voucher. Ms. Rich denied that he had discussed his travel voucher with her before. Mr. Rust accused him of fraud and loudly said that he knew that Sherri Rich 'would never do anything like that.' Mr. Rust talked with Darrell Johnston, the head of the base, and the next day [appellant] was given a formal memorandum ordering him to return to Mare Island on May 31st.

"[Appellant] felt betrayed by Sherri Rich. He and she had had a dating relationship prior to this incident. He had dated her in California and they had gone out together about six times in New York. He thought of her more as a friend, rather than wanting a serious relationship with her. He felt that they 'filled voids' for each other. He used to help her around her house, fixing her dryer, for example. . . ."

* * *

"He indicated that Ms. Rich did not even follow accepted voucher submittal policy. He brought in a memorandum dated April 29, 1985 which is also in the appendix. He noted that she accepted the voucher after the time mentioned in the memorandum. After Mr. Rust had lectured [appellant] and went to talk with Mr. Johnston, Sherri Rich told [appellant] that she had done a lot of 'soul searching' about his travel voucher throughout the night. The usually accepted procedure if there was some question about an individual's travel voucher was to discuss it with the employee. She could have simply told [appellant] to correct his travel voucher rather than bringing it up directly to Mr. Rust. She is the only individual who knew that his travel voucher was incorrect, because he had discussed it with her before submitting it. If he had not done that, something which she denied to Mr. Rust, there was no way that she or anyone else would have known that he had not resided in his rented town house for a full month.

"After being given the orders to return to Mare Island, [appellant] was in a state of shock. He had no idea what he was going to do, especially since his house had just closed. He stayed in New York for another four weeks, using vacation leave. He enlisted the aid of an attorney, but Mr. Johnston would not discuss the issue with him. [Appellant] was not allowed back on the work site, even when he tried to retrieve his personal property.

"[Appellant] had no time to sell his home. He signed it over to a coworker, losing $14,000.

"He subsequently resubmitted his voucher, with the correct expenses, which were well over the limit. He got the same payment that he would have received with his previous voucher. . . ."

After reviewing the aforementioned facts Dr. Sugerman stated:

"DIAGNOSIS (DSM III CRITERIA)

"Axis I: 296.22 Major Depression, Single Episode, without Melancholia 316.00 Psychological Factors Affecting Physical Condition

"Axis II: Probable premorbid passive-aggressive and dependent personality traits

"Axis III: A. Muscle Contraction Headaches

"B. Diarrhea
"C. Status-post infectious hepatitis, November 1984

"Axis IV: Psychosocial stressors: no income, out of work, *Severity*: 5—severe

"Axis V: Highest Level of Adaptive Functioning Past Year: Poor since August 1985, moderate to marked impairment in social and occupational functioning. . . .

> " 'Opinion with reasons for such opinion as to whether and how factors of employment in the SOAF caused, aggravated, precipitated, or accelerated any psychiatric conditon.':

"[Appellant's] work situation with a detailed discussion of work factors as outlined in the SOAF is discussed in the first section of this report. In my opinion, factors of [appellant's] employment caused his Axis I psychiatric disorders: Major De-

> pression and Psychological Factors Affecting Physical Condition.
>
> "There is a clear temporal relationship between the onset and aggravation of these disorders and factors of the [appellant's] employment as acknowledged in the SOAF. There is no evidence of concurrent, nonindustrially related precipitants.
>
> "The SOAF acknowledges the central points which [appellant] makes in his Workers' Compensation claim for a work-related injury. Although initially denying it, the agency later acknowledged that [appellant] was ordered back to Mare Island on May 30, 1985 because of the allegation that he had filed a fraudulent travel claim. This is a tacit admission that this was a disciplinary action, rather in New York. This sudden transfer was devastating for [appellant] who suffered serious financial losses by having to give up a house which he had just purchased as well as suffering severe emotional trauma in being demoted back to a Master Welder position. Prior to these incidents [appellant] had been an ambitious, productive employee who had made steady career progress. His career was a primary source of his sense of self-esteem.
>
> "[Appellant's] emotional trauma was aggravated by the grievance process which increased his mistrust of supervisors and the bureaucratic process in general."

By compensation order dated May 28, 1986, and prior to the payment of any compensation payments, the Office rejected appellant's claim on the grounds that the evidence of record failed to establish that appellant sustained an injury in the performance of duty. The Office noted that disability is not considered arising out of and in the course of employment when it results from frustration at not being permitted to work in a particular environment or to hold a particular position.

In a letter dated June 17, 1986 appellant requested a hearing before an Office hearing representative. A hearing was held on October 8, 1986.

By decision dated February 3, 1987 finalized February 4, 1987, the Office hearing representative affirmed the May 28, 1986 decision finding that appellant's condition did not arise out of factors of his federal employment.

Once the Office of Workers' Compensation Programs accepts a claim it has the burden to prove that either appellant's disability has ceased, or that the claim was erroneously accepted.[5]

In the present case the Office accepted appellant's claim for adjustment disorder with mixed emotional features. However, before the Office paid appellant any compensation benefits it modified its original decision and rejected appellant's claim on the basis of performance of duty. As no compensation payments had been made, the Office stated that it did not have the burden of proof in terminating appellant's compensation benefits. However, the Board has repeatedly held that once the Office accepts a claim it has the burden to prove that either appellant's disability has ceased, or that the claim was erroneously accepted.[6] It is at this point that appellant begins to rely upon the payment of compensation, and it is unjustifiable for the Office to rescind its acceptance without good reason. Therefore, the Office's contention that it was not its burden of proof to rescind appellant's compensaton because no payments had actually been made, is of no merit. The language in some earlier Board decisions which gives the impression that the Office must "pay" compensation before it has the burden to revoke/terminate compensation is deemed purely gratuitous.

The Board finds that appellant's emotional condition was sustained in the performance of duty, as alleged.

As the Board has pointed out in the case of *Lillian Cutler*,[7] "workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment." There, the Board discussed at length the principles applicable to various circumstances involving disabling emotional reactions by employees to factors in the employment. While in many such situations the disability is regarded as due to an injury arising out of and in the course of employment, others are not so regarded. For example, where an employee becomes emotionally upset from not being permitted to work in a particular work environment or hold a particular position or is fearful of a reduction-in-force, the Board has held that "the resulting disability does not have such a relationship to the employee's assigned duties as to be regarded as arising from the employment. The emotional reaction in such circumstances can be truly described as self-generated and as not arising out of and in the course of employment." [8]

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[5] *Mary Jean Thoman (Richard C. Thoman)*, 35 ECAB 682 (1984); *James E. Johnson*, 35 ECAB 695 (1984); *Gerald W. Keoppel*, 35 ECAB 885 (1984); *John C. Mattern*, 35 ECAB 1140 (1984).

[6] *Id.*

[7] *Lillian Cutler*, 28 ECAB 125 (1976).

[8] *Id.*

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Appellant's position with the federal government required him to temporarily relocate from California to New York. While in New York he was entitled to a per diem allowance for his expenses, including lodging. The procedure for claiming these reimbursable travel expenses was a requirement imposed by appellant's employment.[9] Appellant alleges that his emotional condition arose from the controversy surrounding his expenses claimed: the allegation that his travel vouchers were fraudulent, his subsequent orders to return to California; and the termination of his promotion to ship scheduler. As it was part of appellant's duties to submit the travel vouchers, and it was the circumstances relating to this duty which caused appellant's emotional condition, the Board finds that appellant's emotional condition was sustained in the performance of duty.[10] No disciplinary action was ever taken against appellant for filing allegedly false travel vouchers. Thus, there is no wrongful conduct which would remove his claim from occurring in the performance of duty.[11]

The decisions of the Office of Workers' Compensation Programs dated May 28, 1986 and February 4, 1987 are hereby reversed. The case will be remanded to the Office for further development of the medical evidence and a *de novo* decision.

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[9] Section 5702 of Title 5 (5 U.S.C. section 5702) provides federal government employees while traveling on official business away from a designated post of duty a per diem allowance for travel inside the United States.

[10] *Robert E. Green*, 37 ECAB 145 (1985).

[11] *Id.*

In the Matter of Artemio R. Alipio *and* Department of the Navy, Naval Shipyard, Subic Bay, Philippines

Docket No. 88-250; Submitted on the Record;
Issued February 29, 1988

Before Michael J. Walsh David S. Gerson, Willie T.C. Thomas

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for review on the merits pursuant to 5 U.S.C. section 8128(a) of the Federal Employees' Compensation Act.

This is the second appeal in this case. In a decision and order dated September 16, 1986 the Board affirmed a decision of the Office of Workers' Compensation Programs dated June 26, 1986 which rejected appellant's claim for compensation benefits on the ground that his claim did not fall within the jurisdiction of the Federal Employees' Compensation Act.[1] The facts and background of the case are fully set forth in the Board's prior decision and are hereby incorporated by reference.[2]

Appellant, through his attorney, requested reconsideration of the Board's September 16, 1986 decision by challenging the legal sufficiency of the March 10, 1982 International Agreement entered into between the United States Government and the Government of the Republic of the Philippines. By order dated March 31, 1987 the Board reviewed the legal sufficiency of the March 10, 1982 agreement and found that it was properly entered into under authority delegated to the Director of the Office.[3]

By letter dated April 27, 1987 appellant, through his representative, requested reconsideration of his claim by the Office. In support of his request, appellant again contended that his claim be allowed under the Federal Employees' Compensation Act as the March 10, 1982 International Agreement had not been properly executed.

By compensation order dated September 28, 1987 the Office denied appellant's application for review finding that it failed to show that the Office had erred in interpreting or applying a point of law nor did the application advance any legal contention which had not been previously considered. Appellant's application was found *prima facie* insufficient to warrant review.

The only decision before the Board on this appeal is the September 28, 1987 decision of the Office which found that the evidence submitted by appellant was not sufficient to warrant review of the June 26, 1986 decision.

To require the Office to reopen a case for reconsideration, a claimant must submit relevant evidence not previously of record or advance legal contentions not previously considered. Where such evidence or contentions are not present, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under 5 U.S.C. section 8128.[4]

Subsequent to the denial of appellant's claim and review by the Board, appellant requested reconsideration of the claim and presented the legal argument that under the Federal Employees' Compensation Act a special schedule of compensation was provided for noncitizens and nonresidents of the United States at section 8137.[5] Appellant further noted that the Office's regulations implementing the Special Schedule with regard to the Republic of the Philippines appears at 20 C.F.R. section 25.21; however, the section exists unchanged and has not been amended to reflect the terms of the March 10, 1982 International Agreement. For this reason, appellant contends that he remains a civil employee of the United States.

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[1] *See* 5 U.S.C. section 8101 *et seq.*

[2] Docket No. 86-1706 (issued September 16, 1986).

[3] Order Denying Petition for Reconsideration (issued March 31, 1987).

[4] *Joseph W. Baxter*, 36 ECAB 228 (1984).

Appellant also contends that the Director of the Office had no direct participation in entering into the Agreement of March 10, 1982 and did not sign and was not mentioned in the agreement; that the authority delegated to the Director to administer the Act does not include the power to change or amend any of its provisions by agreement or otherwise with finality; that the President did not approve the above agreement; and that there is no known guideline and no known agency authorized by law to implement the provisions on "supplemental benefits."

The Board finds that the arguments raised by appellant before the Office constitute new legal contentions not previously considered by the Office. Considering the foregoing, the Board finds that the Office improperly denied appellant's application for review under section 8128 of the Act. The case will therefore be remanded to the Office for consideration of the new legal contentions raised by appellant.

The September 28, 1987 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to the Office for further action and a *de novo* decision.

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[5] 5 U.S.C. section 8137.

In the Matter of MERTON J. SILLS *and* U.S. POSTAL SERVICE, POST OFFICE, Hazelwood, Mo.

Docket No. 88-60; Submitted on the Record; Issued March 9, 1988

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issues are: (1) whether appellant sustained an employment injury on April 29, 1986 as alleged; and (2) whether the Office of

Workers' Compensation Programs properly denied appellant's claim for reimbursement of medical expenses.

On June 26, 1986 appellant, then a 55-year-old mail handler, filed a claim alleging an injury sustained on April 29, 1986 to his "shoulder and back while lifting mail sacks off tables onto containers." Appellant did not stop work following the injury but noted that he saw a nurse at the employing establishment's health unit on April 29, 1986. On the reverse of the claim form appellant's supervisor noted that appellant had informed him that he was not injured lifting a particular sack of mail, but rather that he had developed pain in his shoulder sometime during the night of April 28, 1986 while repetitively lifting mail sacks. The record indicates that appellant did not lose time from work and no further action was taken on this claim.

On March 9, 1987, appellant filed an Office CA-2 notice of recurrence of disability alleging he had sustained a recurrence of his April 29, 1986 injury on March 5, 1987. This claim form also stated that appellant continued with his work activities following the alleged recurrence.

In support of his claim, appellant submitted a CA-17 form dated March 10, 1987 by Dr. C. M. Benage, a Board-certified surgeon, who stated that appellant was suffering from right shoulder strain resulting in a partial disability from March 10, 1987 to March 17, 1987.[1] In a CA-17 report dated March 17, 1987 Dr. Benage noted that appellant remained partially disabled for the period March 10, 1987 to March 24, 1987 and that appellant could return to full duty after that date. The record indicates that appellant was placed on limited duty from March 10, 1987 to March 24, 1987 and did not sustain any wage loss.

On March 27, 1987, the Office of Workers' Compensation Programs requested that appellant provide a detailed narrative medical report, including a rationalized medical opinion as to diagnosis and the relationship of the disability claimed to the incident of April 29, 1986. Appellant was also requested to provide his own detailed description of how the injury occurred.

In a letter decision dated April 1, 1987 the Office denied appellant's claim for continuation of pay (COP) for his failure to file notice of injury within thirty days of the April 29, 1986 injury. Appellant was further notified that the decision did not affect his entitlement to other compensation benefits.

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[1] Dr. Benage restricted appellant's lifting of over twenty pounds during this time period.

On April 29, 1987, the Office issued a compensation order rejecting appellant's claim for failure to submit sufficient factual information and medical evidence necessary to support his claim.

Appellant requested reconsideration of his claim and submitted an April 16, 1987 report by Dr. Benage who reported a history of injury on March 5, 1987 as, "patient states, 'This is a recurrence of an old injury to right shoulder and back'" and described the injury as "right shoulder strain." Dr. Benage, also again indicated that following examination on March 10, 1987 appellant was placed on light duty work from March 10, 1987 to March 24, 1987 and was returned to regular work on March 25, 1987.

Appellant submitted the May 2, 1987 report of Dr. D. W. Deschamp, a chiropractor, who examined appellant on June 26, 1986 and described the injury as "spasm restriction of motion, swelling, subluxation complex." The chiropractor further indicated that he had not taken x-rays, but had performed manipulation therapy on June 26, 1986.

On May 11, 1987, the Office received appellant's personnel records from the employing establishment. The Office also received a two page form dated June 20, 1986, entitled Neurological, Orthopedic and Physical Examination, along with one page of medical office notes, with notations for the dates of June 20, 1986 and June 23, 1986. Neither the examination form nor the office notes were signed and neither identified with name or address of the physician providing the information.

By compensation order dated July 30, 1987 the Office reviewed the case on its merits and denied modification of the prior decision finding that the medical evidence presented was not sufficient to warrant modification of the prior decision.

On August 3, 1987, the Office received a CA-20 "Attending Physician's Report" from Dr. Benage, dated July 28, 1987. Dr. Benage reported appellant's history of injury as, "this is a recurrence of an old injury to right shoulder and back." Findings and diagnosis were reported as "right shoulder strain." By marking yes to the form question, Dr. Benage indicated he believed the condition treated was causally related to employment activities. Appellant, on August 19, 1987, requested the Office to review the July 30, 1987 decision.

By letter compensation order dated September 9, 1987, the Office denied appellant's application for review and informed appellant that while the July 28, 1987 report by Dr. Benage had not been considered in the July 30, 1987 compensation order, the report was cumulative of information previously provided by Dr. Benage, and therefore appellant's application was *prima facie* insufficient to warrant review of his claim.

On September 24, 1987 appellant docketed his appeal to the Board. On appeal, appellant does not contest the denial of continuation of pay, rather he seeks reimbursement for medical expenses incurred.

The Board finds that appellant has failed to establish that he sustained an employment injury on April 29, 1986 as alleged.

As the Board has stated, an injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, as alleged, but the employee's statements must be consistent with surrounding facts and circumstances and his subsequent course of action. Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment may, cast sufficient doubt on an employee's statements in determining whether he has established a *prima facie* case. The employee has the burden of establishing the occurrence of the alleged injury at the time, place, and in the manner alleged, by a preponderance of the reliable, probative, and substantial evidence. An employee has not met this burden when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.[2]

In the instant case appellant filed a claim on June 26, 1986 alleging injury on April 29, 1986. Appellant continued to work following the alleged injury.

The record establishes that appellant experienced pain while working on April 29, 1986; however, appellant has failed to submit any probative medical evidence to substantiate a need for medical treatment as a result of this incident. Appellant in his original claim stated that he visited the employing establishment's nurse on the night of April 29, 1986. No records of such visit are found in the record. Furthermore, in a letter dated May 11, 1987, referring to the April 29, 1987 incident, appellant states that he did not visit a nurse immediately after the incident, but rather his own physician. No record of such visit to a physician immediately following the incident has been submitted to the record.

The case record does contain a page of unsigned notes of treatment dated June 20, 1986 and June 23, 1986. These forms, lacking proper identification, cannot be considered as probative evidence.[3]

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[2] *Henry W. B. Stanford*, 36 ECAB 160 (1984).

[3] A medical report may not be considered as probative medical evidence if there is no indication that person completing the report qualifies as "physician" as defined in 5 U.S.C. section 8101(2). *See Bradford L. Sutherland*, 33 ECAB 1568 (1982).

The only other report in the record relating directly to the April 29, 1986 incident is a report of Dr. Deschamp, a chiropractor who first examined appellant on June 26, 1986. Dr. Deschamp, however, stated that he did not review any x-rays prior to his diagnosis of subluxation and for this reason the chiropractor's report is not considered probative medical evidence. The Federal Employees' Compensation Act provides that a chiropractor is a "physician" only to the extent that reimbursable services are limited to treatment consisting of the manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.[4] In this case, Dr. Deschamp did not take or review any x-rays at the time of appellant's treatment. Therefore, he is not a "physician" as defined by the Act and his medical report does not constitute "competent" medical evidence to support appellant's claim for medical benefits.[5]

In view of all the circumstances, appellant has failed to establish an injury on April 29, 1986 by a preponderance of reliable, probative, and substantial evidence. Having failed to establish the original injury appellant cannot establish a recurrence of injury as of March 5, 1987.

The Board finds, however, that the Office has not exercised its discretionary authority to determine whether the CA-17 issued by the employing establishment constituted authorization for treatment by Dr. Benage.

The Federal (FECA) Procedure Manual provides that Office form CA-16 is the official form for authorizing examination and/or treatment at the expense of the Compensation Fund. It is used primarily by the official supervisor to refer an employee injured by accident to a local qualified private physician or hospital of the employee's choice.[6] Further, the Office regulations provide that form CA-16 shall be used primarily for traumatic injuries,[7] and that in order to be valid, a form CA-16 must give the full name and address of the duly qualified physician or medical facility authorized to provide service and must be signed and dated by the authorizing official.[8] The period for which treatment is authorized by form CA-16 is limited to 60 days from the date of issuance, unless terminated earlier by the Office.[9]

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[4] *See* 5 U.S.C. section 8101(2).

[5] *See Cary W. Hull*, 33 ECAB 143 (1981).

[6] Federal (FECA) Procedure Manual, Official Authorization for Examination and/or Treatment, Chapter 3-3001, (October 1978).

[7] 20 C.F.R. section 10.402(a).

[8] 20 C.F.R. section 10.402(b).

[9] *Id.*

The regulations also provide for the use of form CA-16 by the employing agency for authorization of medical treatment in "doubtful cases" in order to secure necessary diagnostic study and emergency treatment pending receipt of advice from the Office. The regulations state in pertinent part:

> "If the medical examination or other information received subsequent to the issuance of authorization for treatment discloses that the condition for which treatment was rendered is not due to an injury, the person issuing the authorization shall immediately notify the employee and the physician or hospital that no further treatment shall be rendered at the expense of the Office. In cases of an emergency or cases involving unusual circumstance, *the Office may, in the exercise of its discretion, authorize treatment otherwise than as provided for this part*, or it may approve payment for medical expenses incurred otherwise than as authorized in this section." [10] (Emphasis added)

The record establishes that after appellant filed his claim for recurrence on March 9, 1987 he was issued three Office form CA-17's [duty status report] in which the official supervisor was directed to designate the name and address of the medical facility authorized to provide services. The CA-17's were addressed to North County General Surgery, Inc., Dr. Benage's Office. Although the Office form CA-16 is the official form which authorizes examination and/or treatment at the expense of the Office, in *George Witte*,[11] the Board recognized the discretionary authority of the Office to consider a CA-17 as an authorization for medical treatment. In the present case, the Office has not exercised its discretionary authority to determine whether the CA-17's issued to Dr. Benage should be construed as authorizing treatment.

The case will be remanded to the Office to make a determination of whether the CA-17 forms authorized appellant's medical treatment. Following such determination, the Office shall issue a *de novo* decision with respect to reimbursement for services rendered by Dr. Benage.

The decisions of the Office of Workers' Compensation Programs, dated April 29, 1987 and September 9, 1987 are set aside, and the case is remanded to the Office for further development in conformance with this decision.

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[10] 20 C.F.R. section 10.403.

[11] *George Witte*, 38 ECAB 585 (1987).

In the Matter of PAULINE BROWN *and* VETERANS ADMINISTRATION, VETERANS ADMINSTRATION HOSPITAL, Danville, Ill.

Docket No. 88-32; Submitted on the Record; Issued March 14, 1988

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether appellant had any disability causally related to a March 6, 1970 employment injury on or after May 10, 1987, the date the Office of Workers' Compensation Programs terminated her compensation benefits.

On March 6, 1970 appellant, then a 47-year-old licensed practical nurse, slipped, hit her left knee against a bed, then fell to her right knee and bumped her left elbow against a bed.

Appellant stopped working due to the injury on June 17, 1970 and has not returned to work. Appellant retired on disability effective December 14, 1971.

In support of her claim for compensation appellant submitted a June 23, 1970 report by Dr. James D. Jones, an employing establishment physician and an osteopath, regarding an examination of appellant performed on June 17, 1970. Dr. Jones noted the March 6, 1970 employment incident, diagnosed "thrombophlebitis of veins, left leg" and indicated that he believed appellant's condition was related to the employment incident as it was recounted to him by appellant.

The Office accepted appellant's claim for contusions of both knees and left elbow, subsequent thrombophlebitis of the left leg, Baker's cyst of the left knee and patellectomy of the left knee. Appellant received temporary total disability compensation beginning June 17, 1970. Disability payments were interrupted during the period of January 2, 1974 through December 8, 1975 when appellant received a schedule award for 35 percent permanent partial loss of use of the left leg.

In a June 7, 1982 report Dr. Gene D. Moore, a psychiatrist and neurologist and appellant's treating physician, diagnosed osteoarthritis as appellant's "primary contributing cause of her disability" and stated as follows:

> "The causal relationship of [appellant's] bad knees, history seems directly related to the fall. [Appellant] is without ques-

> tion predisposed to arthritis. However, I do not believe that she would have had a severe problem with her left knee if she had not fallen or had not been operated on. I believe that the arthritis was greatly aggravated by the trauma. This occurs quite frequently and there is little scientific way to document this from a medical standpoint. I believe that this is an accepted fact in medicine that trauma aggravates osteoarthritic conditions. I believe that [appellant's] condition was severely aggravated by her trauma and her present condition is a direct result of her fall. [Appellant] at this time cannot stand, squat, climb, kneel, twist or stand for very long period[s] of time. She cannot walk for very long periods of time. The likelihood of her being improved by any type of surgery and being rehabilitated is practically nil. I believe that her condition is essentially unchanged since my last report. I believe at this time treatment efforts should be aligned at palliation of her pain. I believe that we should try to get her to walking more and being more active at home. I feel that [appellant] is totally disabled at this time. I believe that she is disabled because of her bad knees, specifically because of the severe arthritic condition in both knees."
>
> * * *
>
> "At this time I feel she is totally disabled and I believe her disability is a result of her injury in 1970."

Dr. Mark R. Stevens, a Board-certified orthopedic surgeon, in a July 17, 1985 report indicated that appellant had "medial joint space narrowing, worse on the left knee, but on the right knee consistent with unicompartmental arthritis" and stated that a high tibial osteotomy was indicated.

On February 24, 1986 Dr. Arthur K. Cieslak, an Office medical adviser and a Board-certified surgeon, reviewed the case record and a statement of accepted facts and opined that appellant's condition was "due to gradual degeneration of the left knee joint the result of aging and not due to the contusion at work in 1970." Dr. Cieslak recommended that appellant be referred to an impartial medical specialist in the field of orthopedic surgery for a thorough examination, a review of the case record and a rationalized medical opinion as to whether appellant's condition was causally related to the March 6, 1970 employment injury.

On April 18, 1986 the Office referred appellant along with the case record and a statement of accepted facts to Dr. Lee M. Cattell, a Board-certified orthopedic surgeon, for an examination evaluation and a rationalized medical opinion as to whether the requested tibial osteotomy was causally related to the March 6, 1970 employment injury, a diagnosis of appellant's actual employment-related condition, and an opinion as to whether appellant was totally disabled for all work.

In a May 17, 1986 report Dr. Cattell stated that he examined appellant on May 5, 1986, noted the March 6, 1970 employment injury, subsequent complaints and medical treatment, and gave his findings upon examination.

Dr. Cattell then stated:

> "It is my clinical opinion that this patient has the following diagnoses: (1) contusion to the left and right knee, (2) contusion to the left elbow, (3) osteoarthritis of the left and right knee, (4) status—postoperative arthrotomy with excision of Baker's cyst and patellectomy, left knee, (5) status—postoperative myelogram, (6) status—postoperative cervical discectomy and fusion, (7) status—postoperative lumbar laminectomy, (8) obesity.
>
> "As per your request I have filled out the form OWCP-5 [work restriction evaluation] indicating my opinion as to the patient's ability to perform the various works.
>
> "In answer to your question is the patient totally disabled, it is my opinion that this patient would be able to perform a part-time limited type of work activities."

With his May 17 report Dr. Cattell submitted a completed work restriction evaluation form indicating that appellant could work six hours per day with certain restrictions.

By letter dated July 11, 1986 the Office requested Dr. Cattell to submit a supplemental report addressing: (1) whether the work restrictions listed on the work restriction evaluation form were causally related to the 1970 employment injury; (2) whether the requested tibial osteotomy was causally related to the 1970 employment injury; and (3) if the work restrictions were not causally related to the 1970 employment injury, the reason appellant could not return to work.

In a supplemental report dated July 18, 1986 Dr. Cattell stated as follows:

> "In reply to your letter of July 11, 1986 and responding to the questions that you proposed: (1) Opinion as to whether the restrictions listed on OWCP-5 are necessary due to the work injury of March 6, 1970? Answer: No. This patient had a simple bruise to the knee and arm. This type of injury heals without sequelae in a matter of 3 to 6 weeks. (2) Should the surgery requested by Dr. Stevens be authorized due to the injury? Answer: No. Same reason as above. (3) If work restrictions are not due to injury, why can't the employee return to duty? Answer: Because this lady is, first of all, 64 years old, and obese. She has had neck surgery, and back surgery and surgery on her knees, and probably will have some additional surgery on her knees. As I indicated on my form OWCP-5 . . . this patient, in my opinion, could work at a sedentary type of activity about 6 hours a day."

On January 7, 1987 the Office issued appellant a "Notice of Proposed Termination of Compensation" indicating that it proposed to terminate her compensation for loss of wages because the weight of the medical evidence established that her continuing disability was not causally related to the March 6, 1970 employment injury. The Office provided appellant 30 days within which to submit any additional evidence.

By letter dated January 17, 1987 appellant stated that she disagreed with several findings and conclusions of Dr. Cattell. Appellant also submitted an October 9, 1985 report of Dr. Robert T. Clayton, a Board-certified surgeon, regarding an examination of appellant conducted on the same date. Dr. Clayton noted the March 6, 1970 employment injury, gave his findings upon examination including "fairly advanced osteoarthritis of the medial compartment," and discussed the advisability of performing an osteotomy versus a total joint arthroplasty.

By compensation order dated May 1, 1987 the Office terminated appellant's compensation effective May 10, 1987 on the ground the weight of the medical evidence established that appellant's disability resulting from the March 6, 1970 employment injury had ceased by May 5, 1986, the date of Dr. Cattell's examination.

The Board finds that the Office failed to meet its burden of proof in terminating appellant's compensation on March 10, 1987.

The Board notes that the Office accepted appellant's claim for "contusions of both knees and left elbow, subsequent thrombophlebitis of the left leg, Baker's cyst of the left knee and patellectomy of the left knee," based upon medical reports by appellant's physicians, Dr. Jones, an osteopath, and Dr. Moore, a psychiatrist, and paid compensation for temporary total disability from June 1970 until March 1987 with the exception of the period of January 1974 to December 1975 during which appellant received a schedule award for 35 percent permanent partial loss of use of the left leg.

On February 24, 1986 an Office medical adviser opined that appellant's condition was "due to gradual deterioration of the left knee joint the result of aging and not due to the contusion at work in 1970."

The Office determined that a conflict of medical opinion existed between appellant's treating physicians and the Office medical adviser as to whether appellant's current disability was causally related to the March 6, 1970 employment injury and referred appellant along with the case record to Dr. Cattell, an impartial medical specialist and a Board-certified surgeon, for a resolution of the conflict.

Once the Office determines that an employee has disability causally related to her federal employment it has the burden of proving that her disability has ceased.[1] This burden of proof is not lessened by the fact that the Office later determines that it initially erred in accepting the claim and awarding compensation. The Office must show with rationalized factual and medical evidence that its initial acceptance of the claim was incorrect and that appellant's disability for the period in question was not causally related to her federal employment.[2]

Dr. Cattell's May 17, 1986 and July 18, 1986 reports in which he opines that the March 6, 1970 employment injury resulted in simple bruises to appellant's knee and arm (which typically resolve within three to six weeks) lack sufficient rationale and medical findings to meet the Office's burden of proof to establish that appellant's employment-related disability ceased on or before March 10, 1987. In his May 17, 1986 report Dr. Cattell includes the diagnoses, "osteoarthritis to the left and right knee, status-postoperative arthrotomy with excision of Baker's cyst and patellectomy, left knee" and in his July 18, 1986 supplemental report he indicates that appellant's current disability is due to her age, obesity, past surgeries (including knee surgery) and future need for knee surgery. Dr. Cattell does not address the issue of causal relationship between the March 6, 1970 employment injury and appellant's subsequent thrombophlebitis, Baker's cyst, patellectomy, or 35 percent permanent partial loss of use of her left leg which the Office accepted as being employment related. Additionally, while Dr. Cattell indicates that appellant's current condition is related, at least in part, to past and probable future knee surgery, he does not discuss the causal relationship between the employment injury and appellant's past and future knee surgeries. Finally, Dr. Cattell does not discuss the contention of appellant's physician, Dr. Moore, that while appellant may have been predisposed to arthritis, the trauma of the fall in March of 1970 and the resultant knee surgeries greatly aggravated her arthritic condition and resulted directly in her current condition.

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[1] *Thomas Lindsey*, 39 ECAB 562 (1987).

[2] *Jimmie D. Brewer*, 35 ECAB 197 (1983).

The May 1, 1987 decision of the Office of Workers' Compensation Programs is hereby reversed.

In the Matter of ROBERT H. EVANS *and* DEPARTMENT OF THE NAVY, LONG BEACH NAVAL SHIPYARD, Long Beach, Calif.

Docket No. 88-329; Submitted on the Record;
Issued March 14, 1988

Before MICHAEL J. WALSH, GEORGE E. RIVERS, MICHELE VON KELSCH

The issue is whether appellant has a pulmonary condition which is causally related to his exposure to asbestos in his federal employment.

On May 31, 1985 appellant, then 70 years old, filed a claim for "Occupational lung disease/asbestosis" which he attributed in part to his exposure to asbestos, welding fumes, silica, and other fumes while working as a rigger at the employing establishment from 1943 to 1947.

Appellant submitted reports of his hospitalization from April 9 to 14, 1981. In an admission report Dr. Robert Lugliani, who specializes in pulmonary diseases, stated that appellant was admitted for shortness of breath and chest pain, that his other symptoms included easy fatigability, cough, expectoration of yellowish-greenish phlegm, and increasing dyspnea on exertion, and that on examination he showed scattered rhonchi, wheezes, and bibasilar rales. Dr. Lugliani diagnosed chronic obstructive pulmonary disease in acute exacerbation, arteriosclerotic cardiovascular disease with angina pectoris, congestive heart failure, and probable pulmonary asbestosis. In a discharge summary, Dr. T. Jayaram, who is Board-certified in pulmonary disease, stated that pulmonary function studies showed mild restrictive lung disease, that appellant's acute exacerbation of chronic obstructive pulmonary disease for which he was admitted had responded well to treatment, and that his final diagnoses were chronic obstructive pulmonary disease, chronic bronchitis and emphysema in acute exacerbation, arteriosclerotic heart disease with angina, and probable pulmonary asbestosis.

Appellant also submitted a March 25, 1985 report from Dr. Steven M. Gitlin, who is Board-certified in pulmonary diseases. In this report Dr. Gitlin set forth appellant's history, appellant's complaints, and his findings on physical examination and pulmonary function studies, and a chest x-ray. Dr. Gitlin concluded:

> "Objectively, pulmonary function tests demonstrate a mild restrictive ventilatory defect. Flow rates are essentially within normal limits. Chest x-rays demonstrate pleural thickening on the oblique films. On physical exam he has early clubbing with loss of the angle and softening of the nail bed. These findings are all consistent with asbestos exposure. Reviewing Mr. Evans clinical history of substantial asbestos exposure, combined with subjective evidence of effort dyspnea and fatigue and his objective evidence of restrictive lung disease, pleural thickening and clubbing, I believe the patient has developed asbestotic lung disease. His asbestotic lung disease is a result of his long term exposure to asbestos. I suggest there be no apportionment to non-occupational factors. His symptoms and pulmonary function tests indicate he should be placed in a category of moderate affection of his pulmonary tissues. His condition is considered permanent and stationary. He will need lifetime medical care for his asbestotic lung disease and for surveillance of the cancers associated with asbestotic lung disease."

By a compensation order dated January 21, 1986 the Office of Workers' Compensation Programs denied appellant's claim on the ground that it was not timely filed. Appellant appealed this decision to the Board, which by a decision and order dated June 12, 1986 remanded the case to the Office for further development of the evidence on the time limitation issue.[1]

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[1] Docket No. 86-972.

On November 5, 1986 Dr. Charles C. McDonald, who is Board-certified in pulmonary diseases, reviewed the medical evidence as an Office medical consultant and stated:

> "At this time, the file contains an admission and discharge summary surrounding treatment for exacerbation of COPD. There is also a more current evaluation in which asbestos related pulmonary disease was noted. However, neither of these evaluations are in a posture for adjudication. Dr. Lugliani's diagnosis of asbestos related disease appears to be based on the rales heard on physical examination which were not heard on the more current evaluation by Dr. Gitlin. The pulmonary function tests obtained by Dr. Lugliani are not included in the file. Dr. Gitlin has not provided a radiologist's interpretation of the chest x-ray, nor has he provided complete pulmonary function tests. The diagnosis of 'asbestotic' lung disease is vague. Given the lack of rales on physical examination of the lungs, clear parenchyma by chest x-ray, and normal diffusing capacity on pulmonary function tests, I am unable to state that interstitial lung disease is in fact present. In order to more effectively evaluate the claimant, I would recommend that he be referred to a Board-certified pulmonary specialist for a complete evaluation. I would be happy to review the file again when this evaluation has been received."

On November 24, 1986 the Office referred appellant, the case record and a statement of accepted facts to Dr. Daniel K. Kao, who is Board-certified in pulmonary diseases, advising the doctor that the purpose of the referral was "resolving a conflict in medical opinion."

In a January 8, 1987 report Dr. Kao set forth appellant's history, complaints, and his findings on examination including a chest x-ray which showed no evidence of alveolar or interstitial infiltrates. Dr. Kao concluded:

> "Diagnostic Impression:
>
> "(1) History of occupational asbestos exposure.
>
> "(2) No radiographic evidence or physiologic evidence illustrated by pulmonary function studies of a restrictive lung disease or interstitial fibrosis.
>
> "(3) Chronic sputum production and obstructive lung disease measured by suboptimal pulmonary function studies."

* * *

"Discussion:

> "Mr. Robert H. Evans is a 71-year-old black male with a history of definite occupational-related asbestos exposure. He has complaints of progressive shortness of breath for the last ten years and chronic sputum production. Physical examination, chest radiographic evidence, as well as pulmonary function studies show no evidence of either interstitial fibrosis, pleural plaques, or restrictive physiological defect on lung function studies.
>
> "The patient does have a significant history of chronic sputum production. He also has an obstructive defect on present pulmonary function studies performed on December 18, 1986. The pulmonary function studies, however, are suboptimal secondary to patient effort at this time. Given that the patient is essentially a nonsmoker, the possibility remains whether the patient's obstructive lung defect was exacerbated by his exposure to chronic fumes and dusts when he was employed at the Long Beach Naval Shipyard as well as the other places where he was employed handling asbestos and other dust-like materials.
>
> "His description of disability would appear to be mild to moderate in nature. This disability should be considered as permanent and stationary. There is again no evidence of restrictive lung disease or interstitial fibrosis by available testing. This would be Class II impairment under AMA 2nd Ed. guidelines.
>
> "The patient's prognosis is that if he avoids continued exposure to dust and irritating fumes that his obstructive lung disease will remain stationary. Given the patient's documented history of asbestos exposure, recurrent medical evaluations to screen for occult malignancies that are known to be associated with asbestos exposure should be periodically performed."

By a compensation order dated March 4, 1987 the Office found that the weight of the medical evidence was represented by the report of Dr. Kao, an impartial medical specialist resolving a conflict of medical opinion between Dr. McDonald and Drs. Gitlin and Lugliani, and established that appellant had no asbestos-related lung disease.

The Board finds that there is presently a conflict of medical opinion, necessitating referral to an impartial medical specialist pursuant to section 8123(a) of the Federal Employees' Compensation Act.[2]

Dr. Gitlin, who is Board-certified in pulmonary diseases, concluded that appellant's pulmonary function test showed a mild restrictive defect, that his chest x-rays demonstrated pleural thickening, and that these findings when considered with appellant's history of asbestos exposure, and his symptoms of effort dyspnea and fatigue led the doctor to believe he had "developed asbestotic lung disease." Drs. Lugliani and Jayaram diagnosed probable pulmonary asbestosis.

On the other hand, Dr. Kao, who is Board-certified in pulmonary diseases, concluded that appellant's pulmonary function test showed no evidence of a restrictive lung disease, that his chest x-ray showed no evidence of pleural plaques, and that in his opinion appellant had no evidence of restrictive lung disease or interstitial fibrosis.

The Office erred in stating that its referral to Dr. Kao was made to resolve a conflict of medical opinion between Drs. Giltin and Lugliani and Dr. McDonald. Dr. McDonald, an Office medical consultant in this case, did not specifically indicate that appellant did not have lung disease related to his exposure to asbestos in his employment, but instead noted that the examinations by Dr. Lugliani and Dr. Gitlin revealed differing findings, expressed inability to state that interstitial lung disease was present, and recommended referral to a Board-certified pulmonary specialist "in order to more effectively evaluate the claimant" and "for a complete evaluation." Dr. McDonald's report does not constitute medical evidence of the type needed to resolve the issue in the case and did not create a conflict of medical opinion with the report of Dr. Gitlin.[3]

The decision of the Office of Workers' Compensation Program dated March 4, 1987 is set aside and the case remanded to the Office for referral of appellant, the case record and a statement of accepted facts to an appropriate medical specialist for a reasoned opinion whether he has a disabling pulmonary condition which is causally related to his exposure to asbestos in his federal employment, to be followed by a *de novo* decision.

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[2] 5 U.S.C. section 8123(a) states in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

[3] *See Ann E. Taylor*, Docket No. 87-511 (issued June 12, 1987); *Larry D'Arienzo*, Docket No. 86-1718 (issued October 27, 1986).

In the Matter of HOPE J. KAHLER, claiming as widow of ROGER A. KAHLER *and* DEPARTMENT OF THE INTERIOR, U.S. GEOLOGICAL SURVEY, Reston, Va.

Docket No. 86-1362; Hearing March 2, 1987;
Issued March 15, 1988

Appearances: *Craig Becker, Esq.*, for appellant; *Sheldon G. Turley, Jr., Esq.*, for the Director, Office of Workers' Compensation Programs.

Before MICHAEL J. WALSH, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issues are: (1) whether the employee's death on June 15, 1982 was sustained in the performance of duty; and (2) if so, whether the Office of Workers' Compensation Programs can initially invoke the affirmative defense of intoxication on appeal.

On June 23, 1982 appellant filed a claim for death benefits for the death of her husband, a 36-year-old petroleum engineer, in an automobile accident on June 15, 1982. A police accident report indicated that the employee was the driver of an automobile driving on South Lakes Drive at a high rate of speed, that the automobile left the roadway to the left and struck a light pole at 3:25 p.m. on June 15, 1982, and that the employee was dead on the scene. The death certificate stated that the employee died at 3:25 p.m. on June 15, 1982 of multiple, severe injuries sustained when the automobile he was driving hit a utility pole.

In a June 28, 1982 report on a form of the Office of Workers' Compensation Programs, the employee's Branch Chief indicated the employee was in the performance of duty when the automobile accident occurred, and stated "He was returning late from a luncheon." In an August 2, 1982 response to an Office request for further information, the Branch Chief stated "This luncheon was held to celebrate the birthday of one of our Branch employees." The employing establishment also submitted photographs of the accident scene, and maps of its facility indicating where the accident occurred.

In a November 10, 1982 memorandum regarding a meeting with appellant's attorney, an Office claims examiner recommended acceptance of appellant's claim on the basis that the fatal accident occurred on the employing establishment's premises during regular working hours.

The Office of the Inspector General submitted a copy of its March 28, 1983 investigative report, which included police and autopsy reports and interviews with the employee's coworkers and supervisors who attended the luncheon. The toxicology report showed a blood level content of ethanol of 0.22 percent weight/volume.[1] A police investigative report concluded that the vehicle the employee was driving was travelling at not less than 66 miles per hour when it went out of control around a curve and that the posted speed limit was 25 miles per hour. Interviews and affidavits indicated that on the morning of June 15, 1982 the Associate Branch Chief told her secretary that it was another coworker's birthday and that this was a "cause for celebration," that the secretary asked the members of the Branch if they would care to go to a luncheon and made reservations at a restaurant for 11:30 a.m., that 15 to 25 Branch employees attended this luncheon during which alcoholic beverages were consumed, that a majority of these employees left about 1:00 p.m., that the employee and five other employees including the Associate Branch Chief and her secretary remained until about 3:00 p.m. during which time more alcoholic beverages were consumed, that the honoree at the luncheon talked the employee into driving the Associate Branch Chief's secretary's car back to the employing establishment as she appeared incapable of driving safely, and that the employee was driving the Associate Branch Chief and her secretary to the employing establishment when the fatal accident occurred. The Branch Chief, in his affidavit and interviews, stated that he had attended the luncheon "for the purpose of promoting employee morale, group unity and [to] encourage an informal exchange of information related to the Branch's activities," that he left the restaurant at about 1:00 p.m. to attend a scheduled meeting, and that in his opinion the employee as a recent hiree "could well have been influenced in his conduct on June 15, 1982 by the fact that the outgoing and newly named Associate Branch Chiefs [2] remained at [the restaurant] during the extended period of the lunch time in question." The Branch Chief further stated that he discussed the duty status of the employee with the employing establishment's personnel office, that he was informed that he could not place the employee on annual leave for the afternoon of June 15, 1982 as leave had not been requested by the employee, that he listed the employee in a duty status as he "was left with the impression that putting these individuals on

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[1] A section of the motor vehicle laws of Virginia shows that 0.10 percent level or more creates a presumption a person was under the influence of alcoholic intoxicants.

[2] The honoree at the luncheon had been selected to replace the Associate Branch Chief.

AWOL (absent without leave) would be a "capricious, cruel and adverse action," but that he did "not consider their extended attendance at the . . . luncheon past [his] reasonable expectation of their return (1:30 p.m.) as duty related." The Chief Geologist of the employing establishment stated that although there was a certain leeway on lunches normally the individuals would not be considered on duty during their extended absence.

By a decision dated August 4, 1983 the Office determined that appellant, the deceased employee's widow, was entitled to death benefits under the Federal Employees' Compensation Act, and began payment of such benefits.

In a February 23, 1984 response to an Office inquiry, the Director of the employing establishment stated:

> "1. South Lakes Drive is a public right of way; its access is not limited to those having business at the National Center."

* * *

> "2. As stated above, the U. S. Government owns the property, including the road surface and shoulder, where the accident took place. The road surface and shoulder are maintained by the General Services Administration, using in-house personnel.
>
> "3. Parking Lot V is a restricted lot to which the claimants did not have access. Mr. Kahler was driving toward the main entrance, which would be the second right turn on the map. It is not at all unusual for employees to be dropped off at the main entrance before the driver parks in one of the outermost parking lots which are open to all employees."

* * *

> "6. The Geological Survey works under flexitime. Employees work an 8-hour day, with 30 minutes for lunch, between the hours of 7:00 a.m. and 5:30 p.m. All employees are expected to be present during core time, from 9:00 a.m. to 3:30 p.m., except during their lunch period. Official business hours are 7:45 a.m. to 4:15 p.m. The 30-minute lunch period is noncompensable time 'off-the-clock,' in accordance with rulings of the General Accounting Office. Normally employees are allowed 30 minutes for lunch. There are no official times designated for employees to go to and return from lunch; however, the cafeteria on the premises serves lunch from 11:00 a.m. to 1:30 p.m., and most employees take their lunch period within this time frame.

> "7. On occasions such as an employee's retirement or departure from the Geological Survey, or a significant birthday, as was the case on the day of the accident, employees may sometimes go out to lunch together away from the premises. There is no official policy regarding the length of absences on these occasions, and individual supervisors normally deal with these occasions on a case-by-case basis. These are special events which do not occur regularly or frequently, and we consider that such gatherings have a positive benefit insofar as they enhance employee morale. There is usually no formal time accounting for these absences. In general, our employees are conscientious and dedicated people who feel a keen sense of responsibility for the work that they do. Frequently they will come in early or work late to make up time lost on such occasions; the expectation is that they will get their work done. There is no formal policy that requires them to work extra hours when an infrequent lunchtime party keeps them away beyond the normal lunchtime, nor do we believe such a policy is necessary."

The employing establishment also submitted a copy of the December 20, 1973 lease agreement between Gulf Reston Properties, Inc. and the U. S. Government acting by and through the Administrator of General Services. Under this agreement the U. S. Government, which owned the land on which the employing establishment is presently located and which leased this land to Gulf Reston Properties, Inc. on June 28, 1971, subleased from Gulf Reston Properties, Inc. the land, buildings and improvements, "roadways, parking areas and all open areas." The U. S. Government agreed "to pay and discharge all costs, expenses and obligations of any kind relating to the maintenance, preservation, care, repair and operation of the Premises," with the Premises defined in the agreement as including the grounds and streets located on the leased land.

On April 5, 1984 the General Services Administration's Chief of Space and Facilities at the employing establishment advised the Office that South Lakes Drive was a public use, government-owned highway, that the employing establishment could not close it, that road users were subject to federal search and seizure and to speeding tickets by the Federal Protective Service in addition to state and local enforcement, that the General Services Administration would have done road repairs after the accident but that the employing establishment would not have been charged as it was not the only user of the road, that the road was U. S. Government property but not specifically the employing establishment's property, and that the tenants of the building housing the employing establishment included another division of the Department of the Interior.

In an April 17, 1984 letter to the Office, appellant's attorney contended that a witness' automobile contributed to the employee's fatal accident, that the birthday luncheon benefited the employing establishment as well as its employee and was condoned by and participated in by the employee's supervisor, that the employee was requested or ordered to drive back from the luncheon by the future Associate Branch Chief, and that the accident occurred on the employing establishment's premises as shown by its maintenance and control of the road.

In telephone conversations on June 27, 1984 the Office of the Inspector General advised the Office that the employing establishment was responsible for maintenance, repair, and snow removal on the portion of South Lakes Drive on which the accident occurred. In a July 6, 1984 letter the Office of the Inspector General informed the Office:

> "South Lakes Drive is a state road maintained by the State of Virginia. It enters into a three-way intersection between South Lakes Drive, Sanibel Drive and the service road to USGS on the south side of the USGS property. Technically, South Lakes Drive terminates at the intersection. The service road continues north from the intersection of South Lakes Drive and Sanibel Drive. The service road is on Federal Government property, but is not restricted to outside traffic. The General Services Administration (GSA) maintains the service road which connects South Lakes Drive with Sunrise Valley Drive. GSA contracts repairs to the service road on an as needed basis with the exception of snow removal which is contracted on an annual basis.
>
> "I have enclosed an aerial photograph of the area surrounding the USGS site and two maps of the property from the Fairfax County Transportation Department."

The enclosed maps and photograph were consistent with the above description and do not depict South Lakes Drive north of intersection with Sanibel Drive. These maps and photograph show that the only buildings on the service road connecting South Lakes Drive to Sunrise Valley Drive are those in which the employing establishment is housed, that the only exits contained on this service road are entrances to the employing establishment's main building and to its parking lots, and that there is no access to the parking lots and the main building other than the service road on which the accident occurred.

By a decision dated July 3, 1985 the Office rescinded its acceptance of appellant's claim. The Office found that the employee was not in the performance of duty at the time of his fatal accident on the basis that he stayed at the restaurant beyond the reasonable expectation of one intending to resume the work day, and his stated intention of not returning to work. The Office's July 3, 1985 decision also stated:

> "The original acceptance was based on the determination by the District Office that a defense on the grounds of intoxication could not be successfully made. That is not to say that it could not be established that the decedent was intoxicated or that he was driving at an unsafe speed. However, the Office burden to prove that intoxication was the proximate cause (which allows that there can be no intervening or contributing factors that could be implicated as cause of the accident other than the intoxication) was made impossible by the presence of another car on the roadway where the accident occurred."

Appellant's attorney requested a hearing before an Office hearing representative which was held on October 21, 1985. He submitted an affidavit from the honoree at the June 15, 1982 birthday luncheon who stated that he had talked to the employee about employment-related topics at that luncheon and an affidavit from the Associate Branch Chief who stated that it was a routine practice for all Branch employees to go out for lunch to celebrate Branch employees' birthdays, that all Branch employees in the Office on June 15, 1982 were invited to the luncheon on that date, that the employee had begun working at the Branch less than one month before June 15, 1982 and "It was my custom and practice as well as that of other employees in the Branch to work later than usual if we arrived at work later than usual or took a longer lunch break than usual." Also submitted was an affidavit from appellant who stated that the employee's practice and custom was to eat lunch at the employing establishment and that he rarely if ever socialized with other employees during nonworking hours.

In his brief submitted at the hearing and at the hearing, appellant's attorney contended that the luncheon on June 15, 1982 was an official function and a customary practice, that the employee's attendance was implicitly required as the luncheon was conceived and organized by his immediate supervisor, the Associate Branch Chief and was to honor the person about to replace her as the Associate Branch Chief, that the employing establishment derived substantial benefit from the luncheon discussion of work, new personnel becoming acquainted and improved morale, that the employer directed the employee to drive back from the luncheon, that the location of the fatal accident was beyond all the parking lot entrances and showed that the employee was returning his passengers to the main entrance, that the accident occurred on the employing establishment's premises either going to or coming from work and that the Office's reasons for rescinding the claim were not valid.

By a decision dated and made final on February 12, 1986 an Office hearing representative found that the employee was not in the performance of duty at the time of his fatal automobile accident on June 15, 1982. The hearing representative found there was no express or implicit requirement that the employee attend the luncheon, that the luncheon was purely recreational, and that the site where the accident occurred was not a part of the employing establishment's premises.

Once the Office accepts a claim and pays compensation, as it did in the present case, it has the burden of justifying termination or modification of benefits. The Office has the burden of proof where it contends that its original acceptance of the claim was in error.[3]

The Board finds that the Office has not established that the employee's death on June 15, 1982 was not sustained in the performance of duty.

As the Board has pointed out:

> "Under the Federal Employees' Compensation Act an injury sustained by a plant employee, having fixed hours and place of work, while going to or coming from work is generally not compensable because it does not occur in the performance of duty. This is in accord with the weight of authority under workmen's compensation statutes that such injuries do not occur in the course of employment. However, many exceptions to the rule have been declared by courts and workmen's compensation agencies. One such exception, almost universally recognized, is the premises rule: an employee driving to and from

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[3] *John W. Pope, Ph.D.*, 33 ECAB 810 (1982).

work is covered under workmen's compensation while on the premises of the employer." [4]

The Board has also pointed out "When an employee has a definite place and time for work and the time for work does not include the lunch period, the trip away from and back to the premises for the purpose of getting lunch is indistinguishable in principle from the trip at the beginning and end of the work day and is governed by the same rules and exceptions." [5] Thus, an injury on the premises of the employing establishment driving to or from lunch is covered under the Act.[6]

In the present case there is no dispute that the employee, at the time of his fatal automobile accident on June 15, 1982, was either returning from lunch or going home from work. In either instance he would be covered under the Act if the accident occurred on the premises of the employing establishment. The determinative issue thus is whether the location of this automobile accident was part of the premises of the employing establishment.

In defining what constitutes the premises of an employing establishment the Board has stated:

> "The "premises' of the employer, as that term is used in workmen's compensation law, are not necessarily coterminous with the property owned by the employer; they may be broader or narrower and are dependent more on the relationship of the property to the employment than on the status or extent of legal title."

* * *

> "The term 'premises' as it is generally used in workmen's compensation law, is not synonymous with 'property.' The former does not depend on ownership, nor is it necessarily coextensive with the latter. In some cases 'premises' may include all the 'property' owned by the employer; in other cases even though the employer does not have ownership and control of the place where the injury occurred, the place is nevertheless considered part of the 'premises.' " [7]

The Board has also stated that what constitutes the "premises" of an employing establishment is "dependent more on the relationship of the property to the employment than on the status or extent of the legal title." [8]

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[4] *Michael Licata*, 30 ECAB 833 at 834, 835 (1979).

[5] *Jacqueline Nunnally-Dunord*, 36 ECAB 217 (1984).

[6] *See Annette Stonework*, 35 ECAB 306 (1983).

[7] *Dollie J. Braxton*, 37 ECAB 186 (1985).

The Board finds that the employee's fatal automobile accident on June 15, 1982 occurred on the "premises" of the employing establishment.

The site of the employee's fatal accident was the shoulder of the roadway on which the employing establishment is located. The roadway and shoulder are owned by the federal government, road users are subject to federal search and seizure and to speeding tickets by the Federal Protective Service, and the General Services Administration is responsible for the maintenance of the road and shoulder. Although the public was not prohibited from using this road, this fact does not preclude it being considered the "premises" of the employing establishment. The building housing the employing establishment (and a smaller division of its parent agency, the Department of the Interior) is the only building situated on the road in question, and the road in question is the only access to the employing establishment and its parking lots. The employee's fatal accident occurred between the entrances to the parking lots, in which parking was restricted to employees, and the main entrance to the employing establishment, which was the employee's destination at the time of the accident.

Given the factual circumstances in this case, the Board cannot accept the Director's contention that the roadway in question was merely property owned by the federal government and that the employee's crossing on it was merely fortuitous. The Board instead finds that the evidence establishes that there was the required close nexus between the property where the accident occurred and the use made and benefit received by the employing establishment, that the roadway was "so interrelated with the employing establishment that it could have been treated as though it was the actual premises of the employing establishment," [9] and that the roadway in question was "in such proximity and relation as to be in practical effect a part of the employer's premises." [10]

The Board further finds that the Office cannot initially invoke the affirmative defense of intoxication on appeal.

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[8] *Wilmar Lewis Prescott*, 22 ECAB 318 at 321 (1971).

[9] The "close nexus" and "interrelationship" standards are set forth in *William L. McKenney*, 31 ECAB 861 at 864 (1980).

[10] *Prescot, supra* at 322.

In *Paul Raymond Kuyoth* [11] the Board addressed the propriety of the adjudicating agency [12] initially invoking the affirmative defense of willful misconduct before the Board. The Board stated:

> "If the adjudicator believes that the evidence in the case record justifies a finding of the injury being caused by willful misconduct of the claimant, he has the responsibility of making such a finding in the original adjudication of the case. It is manifestly unfair to the claimant, and contrary to the principles governing affirmative defenses, if the adjudicator were permitted to hold back the possibility of utilizing such defense to see if his decision rejecting the claim is overturned on appeal, and if it is, to reopen the case and invoke for the first time the defense of willful misconduct." [13]

The Board further stated in that case:

> ". . . an allegation of willful misconduct is an affirmative defense against payment of compensation that would otherwise be due, and the proper place to raise such defense is during the original adjudication of the case. Such defense is not a remedy that can be preserved for future use in the event that the claimant is successful in overturning the decision regarding performance of duty." [14]

Although *Kuyoth* involved willful misconduct rather than intoxication, the principles set forth therein are equally applicable to intoxication, which the Board has held is an affirmative defense. [15]

In the present case the Office was aware that the employee had consumed alcohol on the afternoon of his fatal accident, but concluded that it could not meet its burden of establishing the affirmative defense of intoxication as the proximate cause of the accident, given that there was a possible intervening cause. Thus, although the Office considered the affirmative defense of intoxication in its adjudication of appellant's claim, it did not invoke this defense as a basis for denying payment of compensation otherwise due. Instead, the Office is attempting to now argue that the affirmative defense of intoxication may be invoked for the first time on appeal if the

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[11] 27 ECAB 498 (1976).

[12] In that case the adjudicating agency was the Panama Canal Company, but the principles stated apply with equal force to the Office.

[13] *Kuyoth*, supra at 505, 506.

[14] *Kuyoth*, supra at 509.

[15] *Alice Marjorie Harris*, 6 ECAB 55 (1953); *Ruth Perras*, (*Charles Perras*) 33 ECAB 1646 (1982).

Board overturns its decision that the employee's death was not sustained in the performance of duty. In accordance with its decision in the *Kuyoth* case, the Board finds that the Office is precluded from invoking the affirmative defense of intoxication in the present case.[16]

The decisions of the Office of Workers' Compensation Programs dated July 3, 1985 and February 12, 1986 are hereby reversed and the case remanded for payment of payment of appropriate compensation benefits.

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[16] As contended by the Director on appeal, the Board addressed defenses in *Kuyoth* and in *Suzanne Evan*, Docket No. 84-99 (issued July 19, 1985) even though the defenses were initially raised on appeal. However, both of these cases were decided on grounds other than the affirmative defenses, and in both cases the Board pointed out the impropriety of invoking the affirmative defense initially on appeal.

In the Matter of EUGENE G. CHIN *and* U.S. POSTAL SERVICE, POST OFFICE, Richmond, Va.

Docket No. 87-1297; Submitted on the Record;
Dated March 18, 1988

Before DAVID S. GERSON, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether appellant sustained an injury in the performance of duty on June 30, 1985.

On July 31, 1985 appellant, then a 31-year-old letter sorting machine operator, filed a claim alleging injury to his back sustained on June 30, 1985 when he was shot numerous times by an assailant while "aiding a fellow federal employee in trouble." Appellant stopped work on the date of injury and was taken to the hospital. On a CA-1 claim form appellant requested continuation of pay and disability benefits.[1]

A July 1, 1985 investigative memorandum was submitted by the employing establishment which stated:

> "Approximately 0737 hours at 1001 School Street, Vehicle Maintenance Facility, Richmond, VA, in the parking lot behind the VMF, an unknown male fired four (4) 30/30 caliber rounds. Ms. Cuffee was hit in the right wrist and neck and was pronounced dead at the scene by Doctor Gates, Medical Exam-

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[1] Appellant returned to work on August 13, 1985.

> iners Office, City of Richmond. Her alleged boyfriend, Eugene G. Chin, was hit twice from the rear—once in the back and once in the abdomen area. Mr. Chin is in the hospital and will probably survive. Both Cuffee and Chin are postal employees at the General Mail Facility, Richmond, VA 23232. They both work Tour I and ended their tour of duty with the post office at 0730 hours June 30, 1985. The Richmond Division Security Force was the first on the scene. Local police responded and are handling the investigation. Postal Inspectors R.J. Smith, P.E. Sandberg, and the Inspector-In-Charge responded. Follow-up with local police department is being accomplished by Inspector R.J. Smith. A suspect has been developed, a 4-count warrant issued, and attempts to locate suspect continuing."

By letter dated August 2, 1985 the employing establishment controverted appellant's claim stating that "the employee was not engaged in official off-premises duties, and the claim was not filed in a timely manner."

By compensation order dated September 6, 1985 the Office of Workers' Compensation Programs denied appellant's request for continuation of pay during his absence from June 30, 1985 to "the present" because "written notice was not given in 30 days."

The employing establishment submitted an investigative memorandum dated August 12, 1985 which stated:

> "1. On Sunday, June 30, 1985, at approximately 7:35 A.M., two postal employees were shot by an assailant alleged to be a non-employee by the name of Choon Man Lee."

* * *

> "3. It was learned that one victim, Postal Employee Eugene G. Chin, . . . Tour I Clerk, had been taken to MCV Hospital with multiple gunshot wounds and that the second victim, Arizona H. Cuffee, . . . Tour I Clerk, was dead at the scene. Interview of witnesses at the scene and Postal Police Officers gave a description of the suspect vehicle involved and the male assailant.
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> "4. Postal Police Officer had observed the suspect vehicle parked on Sledge Street at about 12:30 A.M., while making routine security patrol. However, there was no one visible in the truck at that time nor was the truck on postal property, therefore giving no reason or authority to question the vehicle being parked on public property.

> "5. The investigation revealed that Ms. Cuffee had been receiving flowers and communications from the suspect several months prior to the shooting. The suspect and Ms. Cuffee had met in a business owned by the suspect's father. They had been passing acquaintances only. Although concerned by the communications and flowers, Ms. Cuffee had only conveyed this concern to close friends and had not reported it to the proper authorities. It is alleged that Ms. Cuffee had a conversation with the suspect the night before the shooting had occurred, but, again, she had not reported this to any authority.
>
> "6. The investigation indicates that Ms. Cuffee was shot by her assailant as she was attempting to flee from her car which was parked in the parking lot at the rear of the Vehicle Maintenance Facility, Richmond, VA. Mr. Chin was shot while he was attempting to come to the aid of Ms. Cuffee after leaving his car, which was parked on School Street about 50 feet east of the intersection of School and Sledge Street. Both employees were off the clock at the time of the shooting."

By letter dated September 14, 1986 appellant responded to a request by the Office for additional information concerning the June 30, 1985 incident stating:

> "Although I was not physically on Postal Property, I was shot by a person (nonpostal employee) who was, illegally, as I was on the way to my car. I noticed that a co-worker (Ms. A. Cuffee) was being accosted by this person and in the attempt to render assistance to her, I was shot. Ms. Cuffee was killed."[2]

By letter compensation order dated July 31, 1986 the Office rejected appellant's claim for compensation finding that appellant was not in the performance of duty when the June 30, 1985 injury occurred.

At appellant's request a hearing before an Office hearing representative was held on February 26, 1987 in which appellant testified concerning the factual background surrounding the June 30, 1985 incident. Appellant argued that his injury was compensable under the Federal Employees' Compensation Act because it resulted from the negligence of the employing establishment in failing to provide adequate security measures at the parking facilities adjacent to the employing establishment. Appellant argued that the employing establishment security force was aware of the presence of the assailant long before the incident occurred and took no measure to determine the reason for his presence. Appellant further argued that the National Collective Bargaining Agreement between the employing establishment and its employees required the employing establishment to provide security for parking facilities for the use of the postal employees.

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[2] By letter dated September 14, 1985 appellant requested a hearing before an Office representative regarding the September 6, 1985 denial by the Office of appellant's entitlement to continuation of pay. A hearing was held on February 14, 1986. By hearing representative decision dated May 29, 1986 and finalized June 2, 1986 the Office affirmed its September 6, 1985 decision rejecting appellant's request for continuation of pay finding it was untimely made.

By hearing representative decision dated April 29, 1987 and finalized May 1, 1987 the Office affirmed its July 31, 1986 decision finding appellant was not in the performance of duty when injured on June 30, 1985.[3]

The Board finds that appellant's June 30, 1985 injury was not sustained in the performance of duty.

Congress, in providing for a compensation program for federal employees, did not contemplate an insurance program against any and every injury, illness, or mishap that might befall an employee contemporaneous or coincidental with his employment; liability does not attach merely upon the existence of an employee/employer relation.[4] Instead, Congress provided for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[5] The Board has interpreted the phrase "while in the performance of duty" to be the equivalent of the commonly found requisite in workers' compensation law of "arising out of an in the course of employment." [6]

The phrase "course of employment" is recognized as relating to the work situation, and more particularly, in respect to elements of time, place and circumstances. In the compensation field, to occur in the course of employment, in general, an injury must occur (1) at a time when the employee may reasonably be said to be engaged in his master's business; (2) at a place where he may reasonably be expected to be in connection with the employment; and (3) while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.[7] This alone is not sufficient to establish entitlement to benefits for compensability, the concomitant requirement of an injury "arising out of the employment" must be shown, and this encompasses not only the work setting but also a causal concept, the requirement being that the employment caused the injury.[8] In order for an injury to be considered as "arising out of the employment," the facts of the case must show some "substantial employer benefit or an employer requirement" which gave rise to the injury.[9]

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[3] The Board notes that the Office correctly determined that appellant's argument that the employing establishment was "negligent" in not providing better security was without merit, as the issue of negligence is immaterial under the Act.

[4] *Minnie M. Heubner*, 2 ECAB 20 (1948).

[5] *See* Federal Employees' Compensation Act, 5 U.S.C. section 8101 *et. seq.*

[6] *Carmen B. Gutierrez*, 7 ECAB 58 (1954).

[7] *Id.* at 59.

In the present case appellant's injuries neither "arose out of" nor occurred "in the course of" his federal employment. The case record establishes that appellant's injuries were not sustained on the premises of the employing establishment and that appellant was not working at the time of his injuries. Applying the principles enunciated above, appellant's injuries did not occur in the course of employment because they were not sustained during his regular working hours and did not occur on the employing establishment premises, and therefore it cannot be reasonably said that appellant was engaged in his master's business when he was shot. Furthermore, appellant was not reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto at the time of his injuries. Accordingly, the Board finds that the circumstances of appellant's injuries do not meet the three-part test for injuries which occur in the course of employment.

Larson, in his treatise on *Workman's Compensation Law,* states the following with respect to compensability of acts benefiting co-employees outside of an employee's regular duties:

> "The modern rule brings within the course of employment any activity undertaken in good faith by one employee to assist a co-employee in the latter's performance of his work." [10]

However, Larson states:

> "If the aid takes the form of merely helping the co-employees with some matter entirely personal to the co-employee, it is outside the course of employment. . . . [11]

The Board finds that appellant's injuries did not arise out of his employment. The evidence of record establishes that appellant had left the employing establishment premises after work, at which time he was injured as the result of a personal dispute between a fellow employee, Ms. Cuffee, and her assailant. Appellant has failed to show causality by submitting evidence into the case record indicating some substantial employer benefit, or that the employing establishment expressly or impliedly required appellant to engage in the activities which resulted in the injuries. Neither appellant nor Ms. Cuffee were engaged in the performance of their duties at the time appellant sustained his injuries. In addition, appellant came to the aid of Ms. Cuffee concerning a matter entirely personal to Ms. Cuffee, having no relation to any employer benefit or requirement. Appellant has failed to show that his federal employment caused his injuries sustained on June 30, 1985. Accordingly, appellant has failed to establish that the injuries he sustained on June 30, 1985 "[arose] out of and in the course of employment," hence his injuries are not compensable under the Act, as they were not sustained "in the performance of duty."

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[8] *George A. Fenske, Jr.*, 11 ECAB 471 (1960).

[9] *Nona J. Noel*, 36 ECAB 329 (1984).

[10] A. Larson, *Workman's Compensation Law*, section 27.11 at 5-251 (1982).

[11] *Id.* section 27.15 at 5-262 (1982).

The decisions of the Office of Workers' Compensation Programs dated May 1, 1987 and July 31, 1986 are hereby affirmed.

In the Matter of GLEN E. MCCARTHY *and* DEPARTMENT OF DEFENSE, DEPARTMENT OF DEFENSE INVESTIGATIVE SERVICE, Cookstown, N.J.

Docket No. 87-1864; Submitted on the Record;
Issued March 21, 1988

Before DAVID S. GERSON, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether the medical evidence of record establishes that appellant sustained a subluxation of the spine as a result of the December 17, 1981 employment injury.

On December 17, 1981 appellant, then a 26-year-old special agent, was carrying a 30-pound box of copy machine paper when he slipped and fell on a sidewalk covered with snow and ice, sustaining injury to his neck, left leg and back. Appellant continued to work.

The case record contains an Office of Workers' Compensation Programs form CA-17 ("Duty Status Report") by which the employing establishment authorized Dr. Gregory A. Locke, a chiropractor, to provide medical services to appellant relating to the December 17 employment incident.

Appellant was first seen by Dr. Locke on December 28, 1981 and in a report dated January 6, 1982 Dr. Locke diagnosed "acute lumbosacral strain" and "tendinitis of the left knee" and related appellant's condition to the December 17 employment incident. Dr. Locke described the treatment provided as "manual manipulation to correct vertebral malpositioning and specific correction of associated muscle imbalance, [and] ultrasound applied to local trigger areas." Dr. Locke indicated that he had seen appellant on four occasions including the day of the report, January 6, 1982, and that appellant was scheduled for three future visits. Dr. Locke remarked, "conditions of this nature generally require 12–16 weeks in order to obtain maximum available correction."

In a letter to Dr. Locke dated December 13, 1982 the Office indicated that under the Federal Employees' Compensation Act the services of a chiropractor which are payable by the Office are limited, and stated as follows:

> "This means that a chiropractor can examine a claimant, have an x-ray taken, interpret the x-ray, and if the x-ray confirms that a claimant has a subluxation of the spine the chiropractor can perform manual manipulation of the spine. This is the treatment to which a chiropractor is limited."

The Office further stated that Dr. Locke's diagnosis of "acute lumbosacral strain; tendinitis of the left knee" did not indicate that appellant had a "subluxation of the spine" and that since Dr. Locke did not submit copies of x-rays taken on December 28, 1981 which showed a subluxation of the spine, there was no basis upon which the Office could conclude appellant sustained such a subluxation as a result of the December 17, 1981 employment incident. The Office informed Dr. Locke that because he had been authorized to examine and treat appellant on an Office form, his initial examination and treatment of appellant on December 28, 1981 was payable by the Office but that the Office could not authorize payment for treatment subsequent to December 28, 1981 without an x-ray report confirming that appellant sustained a subluxation of the spine as a result of the December 17, 1981 employment incident.

In a December 24, 1982 letter to the Office Dr. Locke stated that he does not ordinarily list subluxations unless dealing with medicare patients and went on to list the following "subluxations . . .

as viewed by and documented by standing full spine x-ray dated December 28, 1981":

> "Left lateral rotational malpositioning between L2, 3, 4, 5. Rotational malpositioning is present between D6, 7, 8, 9. Rotational malpositioning between 7C, 1D, 2D, 4D, 5D. Rotational malpositioning between C4, 5, 6."

On February 17, 1983 the Office referred the case record to an Office medical adviser, Dr. Sidney M. Samis, Board-certified in preventive medicine, for a reasoned medical opinion as to whether the evidence of record established that appellant sustained a subluxation of the spine as a result of the December 17, 1981 employment incident. After receiving the case record Dr. Samis opined that the record of initial care following the incident suggested that the injury was minimal, that the average lumbosacral strain resolves in a few days to two weeks, and that appellant had probably recovered from any injury by the 11th day following the employment incident. Dr. Samis stated that Dr. Locke's written x-ray report "sounds as if [appellant's] entire spine was twisted." Dr. Samis stated that such a report was incompatible with Dr. Locke's "limited" physical findings and appellant's prior absence of significant back problems.[1] Dr. Samis opined that Dr. Locke's x-ray report was "self-serving" and "cannot be accepted as probative evidence of subluxation" and stated that, based upon that case record, manipulation of the spine was not medically indicated.

By compensation order dated April 13, 1983 the Office rejected appellant's claim for payment of medical bills for chiropractic services on the ground that the evidence of record failed to establish a subluxation of the spine and Dr. Locke's reports therefore did not constitute medical evidence under the Federal Employees' Compensation Act.

By letter dated September 2, 1983 appellant requested reconsideration of the Office's April 13, 1983 decision and submitted a July 22, 1983 report by Dr. Robert H. Hagel, Jr., a chiropractor. Dr. Hagel indicated in his report that he was familiar with the facts of the case and stated that he was "sure" that "Dr. Locke was not aware that the medicare standardization of diagnosis was required" when he submitted his March 5, 1982 and January 6, 1982 reports to the Office and opined that "rotation subluxation . . . can be substantiated from the full spine AP [anterior—posterior] film."

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[1] In his January 6, 1982 report to the Office Dr. Locke listed his findings upon examination as: "limited dorsal lumbar flexion, positive Lasegue's sign, spasm of lumbar paravertebral, patient favoring left knee."

By compensation order dated May 16, 1984 the Office once again rejected appellant's claim for reimbursement for chiropractic services on the ground that neither Dr. Locke nor Dr. Hagel had provided a reasoned opinion causally relating Dr. Locke's x-ray findings of multiple subluxations to the December 17, 1981 employment incident.

By letter dated March 14, 1985 appellant requested reconsideration of the Office's May 16, 1984 decision.

In support of his request for reconsideration appellant submitted a November 30, 1984 letter by Dr. Leon J. Dwulet, a physician specializing in general practice and general surgery, in which Dr. Dwulet stated that he had treated appellant since 1959 and that appellant did not have any back pain or back problems prior to December 1981.

Appellant also submitted a March 6, 1984 report by Dr. D. Michael Warner, a chiropractor, who stated he had treated appellant since May 14, 1984 [sic] for lower back and hip injuries. Dr. Warner stated that he was "sure" appellant's present condition was a result of the December 1981 employment incident; that subluxations were definitely listed in Dr. Locke's x-ray report and that more recent x-rays showed multiple "subluxation complexes" which corresponded to appellant's symptoms. Dr. Warner opined:

> ". . . it is my opinion that all evidence points to [appellant's] present injuries as resulting from the injuries suffered in December 1981. I do not feel anybody but a chiropractor could make a causal relationship of the diagnosed subluxation to the injury. An allopathic physician has a different definition of a subluxation (see Dorland's Dictionary) and is therefore not able to make a fair judgment. All x-rays I've seen have demonstrated subluxation of the spine."

On August 27, 1985 Dr. Samis, the Office medical adviser, again reviewed the case record and stated that Dr. Warner gave no physical findings to support his assertion that the evidence establishes that appellant's present back and leg conditions are causally related to the December 17, 1981 employment incident. Dr. Samis stated that even if appellant has a subluxation of the spine, which hasn't been established, there is no medical evidence of signs or symptoms which would physiologically relate the "minor" 1981 incident to such a subluxation.

On September 17, 1985 the Office referred appellant, along with a statement of accepted facts and the case record, to Dr. Irving

Strouse, a Board-certified orthopedic surgeon and an impartial medical specialist, to resolve the conflict of medical opinion. On October 4, 1985 Dr. Strouse examined appellant, and in an October 15, 1985 report noted appellant's fall in December 1981, his subsequent complaints and medical treatment, his general medical history, and gave his findings on examination.

Dr. Strouse interpreted x-rays presented by appellant as follows:

> "Review of the x-rays which the patient brought with him taken in 1981 by a chiropractor reveals a right thoracic scoliosis, which would be considered mild. Also x-rays of the lumbar spine from 1982 show some anterior wedging of the first lumbar vertebra. Further x-rays were taken of that area, and reveal anterior wedging of L1, T12, and T11. These appear to be more developmental in origin than traumatic. Another x-ray was taken of his thoracic lumbar spine which shows a very mild scoliosis in the thoracic area."
>
> * * *
>
> "My diagnosis in this case would be cervical, thoracic and lumbar sprain. I disagree with the diagnosis of spinal subluxations, since I see no evidence of this on the patient's x-rays. The patient does have a mild thoracic scoliosis which most likely has been present since his adolescence, and would not be responsible for causing him spinal pain.
>
> "As far as his treatment is concerned, I do feel that 9 to 12 months of chiropractic treatment after his injury would be considered adequate, and after this, treatment would be palliative in nature. Because of the neurologic findings found on examination, including the atrophy of the small muscles of the hand, and absent ankle reflexes in the legs, I referred [appellant] to Dr. Gennaro for neurologic evaluation. Dr. Gennaro stated to me that his diagnosis would be Charcot Marie Tooth Disease; this is a hereditary peripheral neuropathy that is unrelated to his past injury."

By letter dated February 20, 1986 the Office asked Dr. Strouse whether his diagnosis of cervical, thoracic and lumbar sprain pertained to appellant's current condition or to his condition on December 17, 1981, the date of the employment incident, and if it pertained to appellant's current condition whether such condition was causally related to the December 17, 1981 employment-related incident. The Office also asked Dr. Strouse to supply a copy of Dr. Gennaro's report.

In a letter to the Office dated February 26, 1986 Dr. Strouse responded as follows:

> "In response to your letter of February 20, 1986, please be advised that [appellant] continues to complain of residual symptoms in his neck and back and my diagnosis is residual cervical and lumbar sprain.
>
> "His condition is secondary to his fall in December of 1981. However he has markedly improved, and is only showing mild residuals from this injury. As far as the limitation imposed by these mild residuals, I feel that the patient should be able to handle his present occupation as he described to me.
>
> "I did refer [appellant] to Dr. Gennaro for neurologic evaluation. A copy of Dr. Gennaro's report is enclosed, but you will note that he did find a diffuse polyneuropathy which he diagnosed as probable Charcot Marie Tooth Disease. This is a familial condition which is unrelated to the patient's injuries."

Dr. Strouse included an October 11, 1985 report by Dr. Paul Gennaro, a physician specializing in allergy and immunology, which stated in part:

> "[Appellant's] chronic low back pain is probably due to a chronic lumbosacral strain. I feel that it is unlikely that he has a lumbosacral radiculopathy as a contributing factor for his low back pain.
>
> "However, [appellant] also has evidence of a diffuse, sensorimotor polyneuropathy, probably due to Charcot Marie Tooth disease considering the family history."

On March 27, 1986 appellant submitted a March 24, 1986 report of Dr. Warner, the chiropractor, which stated the following:

> "[Appellant] is still suffering the effects of an injury he sustained in 1981. At that time, a subluxation syndrome was caused by a trauma to the spine. This subluxation causes the vertebra to twist from its normal position. The articulating surfaces were wrenched apart and subsequent stretching of the ligaments and connective structure occurred at their attachments. This has caused an inherent weakness in [appellant's] spine. This weakness is easily exacerbated and thus radicular pain reoccurs because of nerve root compression. The radicular

> pain causes muscles supporting the injury to go into spasm and to splint in an effort to immobilize the area as a protective mechanism from further aggravation. These exacerbations have severely affected [appellant's] ability to perform the duties of his job since the original avulsive insult to his spine has left him with some permanent damage to his spine. The subluxation keeps reoccurring because of this avulsive insult which stretched the supporting ligaments beyond complete repair. The prognosis in this case is poor to fair. [Appellant] has shown periodic relief but post-traumatic pathology is highly probable because of the original soft tissue damage sustained in 1981."

On April 4, 1986 Dr. Julius Schneiderman, an Office medical consultant who is a Board-certified orthopedic surgeon, reviewed the February 26, 1986 report of the impartial medical specialist, Dr. Strouse, and opined that the usual recovery time for cervical, thoracic and lumbar sprain, which Dr. Strouse diagnosed, is 6–12 weeks, but that appellant also has a disease of the nervous system which is not causally related to the employment incident, and which can increase the recovery time over the usual 6–12 weeks but not over 6 months.

By compensation order dated May 16, 1986 the Office accepted that appellant sustained a cervical and lumbar strain as a result of the December 17, 1981 employment incident, but denied payment of chiropractic bills on the ground that the medical evidence of record failed to establish that appellant sustained a subluxation of the spine due to the December 17, 1981 employment incident.

On July 8, 1986 appellant requested a hearing before an Office representative.

On September 24, 1986 the Office's Branch of Hearings and Review determined the case was not in posture for a hearing because the impartial medical specialist, Dr. Strouse, had not been provided with the Office's definition of "subluxation." Therefore, the compensation order of May 16, 1986 was set aside and the case was remanded to the Office with instructions to return the entire case record to Dr. Strouse, along with a complete definition of the term "subluxation" as currently used by the Office, for a new opinion as to whether x-ray findings in the case record, particularly findings of scoliosis and wedging of the vertebra established that appellant had "a subluxation" of the spine under the Office's current definition and, if so, whether such subluxation was causally related to the December 17, 1981 employment incident.

On November 18, 1986 the Office once again referred the case file to Dr. Strouse along with the following definition of subluxation, "an incomplete dislocation, off-centering, misalignment, fixations or abnormal spacing of the vertebrae anatomically which must be demonstrable on any x-ray film to individuals trained in the reading of x-rays," for his reasoned medical opinion as to whether the medical evidence of record showed that appellant sustained a subluxation of the spine as a result of the employment incident.

In a May 28, 1987 report, Dr. Strouse responded as follows:

> "In response to your letter of November 18, 1986, please be advised that my review of the x-ray film in question did not show any sign of traumatic subluxation in the spine.
>
> "With a scoliosis or other developmental abnormality, as the patient has demonstrated, there are degrees of subluxation of the facet joints, and I am sure that this is present in this patient. However, these subluxations are not traumatic in nature, and are not related to the patient's injury. These subluxations would be caused by the patient's scoliosis as well as the developmental wedging of his vertebrae and are unrelated to his fall. Again I reiterate that his fall caused an injury to the muscles and ligaments, and my diagnosis remains a strain of the spinal areas injured."

By compensation order dated June 29, 1987 the Office denied appellant's claim for payment of chiropractic bills on the ground the weight of the medical evidence failed to establish that appellant sustained a subluxation of the spine as a result of the December 17, 1981 employment incident.

The Board finds that the case is not in posture for decision.

The Office incorrectly found that the medical opinion of the Office medical adviser, Dr. Samis, created a conflict with the opinions of appellant's physicians Drs. Locke and Warner. The Office medical adviser did not base his opinion whether the December 28, 1981 x-ray by Dr. Locke demonstrated a subluxation of the spine upon the actual x-ray films, but upon Dr. Locke's written x-ray report. Hence, the medical adviser's opinion that the x-ray did not demonstrate that a subluxation of the spine was not of equal weight with the opinions of appellant's physicians who actually reviewed the x-ray film. Dr. Strouse, the Board-certified orthopedic surgeon to whom the Office referred appellant, did review the December 28, 1981 x-ray film and therefore his opinion that the x-ray did not demonstrate appellant sustained a subluxation of the spine as a result of the December 17, 1981 employment incident is of equal weight with the opinions of appellant's physicians and creates a conflict.

To resolve this conflict, the Office should refer the case record (including the December 28, 1981 x-ray film), a statement of accepted facts and the current definition of spinal subluxation to a Board-certified radiologist for a rationalized medical opinion as to whether the x-ray establishes that appellant sustained a subluxation of the spine as a result of the December 17, 1981 employment incident.[2]

The June 29, 1987 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded to the Office for further development as outlined above to be followed by a *de novo* decision.

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[2] The Board notes that where a conflict of medical opinion exists between a chiropractor and a medical doctor with respect to the presence or absence of a subluxation, the case file and x-rays should be referred to a Board-certified radiologist for resolution of the conflict. *See* FECA Bulletin No. 84-71 (issued December 14, 1984).

In the Matter of Edward E. Johnson *and* U.S. Postal Service, Post Office, Jacksonville, Fla.

Docket No. 88-28; Submitted on the Record;
Issued March 22, 1988

Before David S. Gerson, Michele von Kelsch, Willie T.C. Thomas

The issue is whether the Office of Workers' Compensation Programs abused its discretion in rejecting appellant's January 14, 1987 vocational rehabilitation plan and accompanying request for a maintenance allowance.

On January 7, 1976 appellant, then a 25-year-old mailhandler, was lifting mail sacks when he developed pain in the middle portion of his back. He stopped working that day and did not return thereafter. He received continuation of pay from January 8, 1976 to February 21, 1976. The Office of Workers' Compensation Programs accepted appellant's claim for a strain of the thoracic spine and paid temporary total disability compensation from February 22, 1976 to July 21, 1976. In a July 14, 1977 decision the Office terminated compensation on the ground that medical evidence established that appellant was fit to return to his regular work as of July 21, 1976.

On July 25, 1983, appellant filed a claim for recurrence of disability. He indicated that he stopped working on July 3, 1983 at his job in processing children detained by state courts. Dr. James W. Dyer, an orthopedic surgeon, submitted a CT (computerized tomography) scan and myelogram of the lumbar spine which revealed findings compatible with a herniated nucleus pulposus on the left side at the L5–S1 level. In a November 22, 1984 decision, the Office vacated its July 14, 1977 decision and paid temporary total disability compensation for intermittent periods from September 23, 1983 to December 29, 1983 and for the period beginning January 13, 1984.

In a November 6, 1986 letter, the Office referred appellant to a vocational rehabilitation coordinator for counseling, guidance testing and placement services so as to locate employment compatible with his work restrictions. In a December 3, 1986 report, the rehabilitation coordinator noted that appellant had earned a bachelor's degree in elementary and special education in 1976. She also indicated that appellant had worked at a youth detention center from 1977 to 1983 and had planned to make a career in working with troubled youths. She reported that the results of testing indicated that appellant should not have any difficulty in passing the state teacher's examination.

Appellant and the coordinator signed and submitted a January 14, 1987 rehabilitation plan which specified responsibilities with regard to job placement activities. The plan indicated that the job categories to be explored were teaching, social service worker and administrative assistant as well as other appropriate positions. The plan was accompanied by a request for a maintenance allowance of $24.60 a week for appellant's use of his car in job search activities.

In a February 5, 1987 report the rehabilitation coordinator reported that she and an Office rehabilitation specialist met twice concerning the January 14, 1987 rehabilitation plan. The Office rehabilitation specialist indicated that he had objections to the specificity of the plan. The rehabilitation coordinator also noted that she had contacted schools within the Duval County (Jacksonville, Fla.) school system. She reported that most schools indicated that they had low turnover, hired in autumn and required teacher certification by the state.

The rehabilitation coordinator submitted a February 23, 1987 plan for job placement activities. The plan indicated that the job categories to be explored included case aide,[1] case worker-child welfare,[2] and clerk general,[3] as well as other related or appropriate positions. In an accompanying memorandum, the coordinator indicated that appellant had transferable skills from his work at the Youth Detention Center. She pointed out that appellant's college degree would allow him to qualify for any position requiring a bachelor's degree in education or in an unspecified field. She stated that the jobs in the February 23, 1987 plan were selected based on appellant's vocational background, education, physical restrictions and interests. She indicated that a labor market survey indicated that clerical positions were abundantly available in appellant's commuting area with over 75,000 positions identified by a local planning council. She commented that while many of the positions required typing, many did not. She stated that approximately six positions in the category case worker, case aide and similar jobs were available each week in the Duval County area.

In a February 23, 1987 letter, appellant indicated that he believed that the January 14, 1987 plan should be submitted. In a February 25, 1987 memorandum the Office rehabilitation specialist informed appellant that the January 14, 1987 rehabilitation proposal was not approved since the suggested job goals were not supported. He stated that it had not been demonstrated that appellant had the necessary qualifications to obtain a position as a teacher and it had not been demonstrated that the jobs were reasonably available to appellant in the Jacksonville area. The Office rehabilitation specialist instructed appellant to advise the rehabilitation coordinator whether he would cooperate in the job placement efforts and to sign the February 23, 1987 rehabilitation plan if he did decide to cooperate.

In a March 5, 1987 letter, appellant stated that he wanted a formal decision indicating that the January 14, 1987 rehabilitation plan was rejected and the reasons for the rejection. He requested that the Office advise him of the information needed to support the plan so that he could furnish it.

In a May 5, 1987 letter, the Office informed appellant that failure to endorse the second rehabilitation plan might result in a reduction or forfeiture of his compensation. The Office gave appellant until May 31, 1987 to comply with the plan. It warned him that if he did not endorse the second rehabilitation plan and make a good faith effort to follow the plan, it would take action to reduce his compensation.

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[1] Department of Labor, *Dictionary of Occupational Titles*, D.O.T. No 195.367-010.

[2] *Id.* D.O.T. No. 195.107-014.

[3] *Id.* D.O.T. No. 209.562-010.

In a May 15, 1987 letter, appellant informed the Office that he had been hired by the Duval County School Board as an elementary school teacher. In a May 21, 1987 letter appellant stated that he and the rehabilitation coordinator had been confused by the reasons for the rejection of the January 14, 1987 rehabilitation plan. He contended that he was not given the opportunity to justify the first plan before a second plan had been presented to him. He stated that he was fully willing to execute a plan which was fully explained to him and did not overlook his educational background, skills, interests, and aptitudes.

In a June 9, 1987 letter, the Office informed appellant that it was proposed to reduce his compensation from temporary total disability compensation to compensation for a 67 percent loss of wage-earning capacity based on his capacity to earn wages as a general clerk. In an accompanying June 7, 1987 memorandum to the Director of the Office, an Office claims examiner recommended that the notice of proposed reduction of compensation be issued because appellant had impeded the job placement effort. Appellant was given 30 days to submit additional evidence if he disagreed with the proposed action.

In a June 22, 1987 letter, appellant stated that he was currently working for the Duval County School Board as a substitute teacher. He indicated that he had yet to be offered a full-time position although he was optimistic that a position would be available before the next school term. He submitted a copy of his state certification as a teacher for the period July 1, 1987 through June 30, 1988. He noted that he had gone to considerable expense in his job placement efforts.

In a June 23, 1987 memorandum, the Office rehabilitation specialist stated that appellant's new evidence did not affect the decisions concerning the rehabilitation program. He noted that appellant had not been qualified as a teacher in January 1987 and had not previously worked as an elementary education teacher although he had obtained a college degree after majoring in that field. The rehabilitation counselor stated that he had talked with an official of the Duval County school system. The school official stated that the school had employed 3,500 teachers in the prior school year and planned to hire 250 new teachers for the next school year. The school official indicated that the school system currently had over 4,000 applications on file for the new teacher positions. The school official indicated that a substitute teacher's assignments depended partly on an assessment of an individual's performance by administrative personnel and principals. The Office rehabilitation counselor stated that appellant could currently apply for jobs as a teacher although he had no current experience and had completed his college program eleven years previously. The counselor commented that, for these reasons, appellant would have difficulty in actually obtaining employment as a full-time regular teacher, although the position might be reasonably available especially since appellant had obtained his teacher's certificate. He pointed out that appellant's employment as a substitute teacher was not regular. He concluded that it did not appear possible to use the position of substitute teacher as a basis for a loss of wage-earning capacity determination.

In a July 6, 1987 meeting between appellant and an Office District Director, appellant contended that the January 14, 1987 rehabilitation program plan was justified particularly as he had a teaching certificate. Appellant requested reimbursement for expenses he incurred while seeking employment under the January 14, 1987 rehabilitation plan.

In an August 3, 1987 letter to appellant, the Office stated that it had considered appellant's teaching certificate but still found that the employment goal of teacher was not reasonable. It indicated however that he would be given an opportunity to demonstrate that he had the capacity to earn wages as a school teacher. The Office instructed appellant to submit a form at the end of each month, reporting what he had earned during that month. The Office stated that after 12 months, it would reevaluate appellant's case and give him a final decision.

In an August 31, 1987 decision, the Office denied approval of the January 14, 1987 vocational rehabilitation plan and denied payment of a maintenance allowance.

The Board finds that the Office did not abuse its discretion in rejecting appellant's January 14, 1987 vocational rehabilitation plan and the accompanying request for a maintenance allowance.

Section 8104[4] of the Federal Employees' Compensation Act, which provides for vocational rehabilitation, vests the Office with discretionary powers. The Office's decision involving the exercise of this discretion will not be disturbed by the Board unless it is clearly in error.[5]

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[4] 5 U.S.C. section 8104.

[5] *See Mary A. Brown*, 27 ECAB 389 (1976) and cases cited therein.

In this case, appellant essentially requested a retroactive approval of his request for a maintenance allowance, submitted in connection with the January 14, 1987 vocational rehabilitation plan. Approval of the request for the maintenance allowance, which was intended to cover appellant's expenses in searching for the jobs listed in the January 14, 1987 plan, was contingent on approval of the January 14, 1987 plan. As the Office rehabilitation counselor pointed out, the plan, in listing the positions of teacher, social service worker and administrative assistant, did not specify the duties of each position, did not discuss whether appellant was qualified for these positions and did not indicate whether these positions were reasonably available within appellant's commuting area. As the plan did not have such supporting evidence as of the time it was submitted to the Office, the Office acted within its discretion in refusing to approve it.

Subsequent development of the record showed that appellant's prior job experience provided him with skills transferable to the positions of case aide, case worker, child welfare, and clerk general. The private rehabilitation coordinator showed that all these positions were reasonably available within appellant's commuting area. The Office rehabilitation counselor reported that, in regard to the position of teacher, the local school board had over 4,000 applications for 250 positions. The rehabilitation counselor pointed out that even though appellant had a teacher's certificate, his lack of experience and the amount of time that had passed since he had earned his degree would hamper appellant's ability to obtain a full-time position as a teacher. These factors show that the position of teacher was not as reasonably available to appellant as other positions. The Office, therefore, properly acted within its discretion in rejecting the January 14, 1987 plan and recommending that appellant sign the second rehabilitation plan which listed positions within appellant's vocational ability that were reasonably available within his commuting area.

The decision of the Office of Workers' Compensation Programs, dated August 31, 1987, is hereby affirmed.

In the Matter of JEFF MICONO *and* U.S. POSTAL SERVICE, POST OFFICE, Albuquerque, N.M.

Docket No. 88-174; Submitted on the Record; Issued March 22, 1988

Before DAVID S. GERSON, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing before an Office hearing representative.

On June 24, 1981, appellant than a 60-year-old carpenter, filed a claim for arthritis of the lumbar spine, right knee and left elbow. He stated that his duties required the handling of construction materials to renovate or expand facilities of the employing establishment. He indicated that some of his work involved climbing ladders and lifting rental box units weighing as much as 400 pounds. He stated that he fabricated mail carts, bulletin boards, desk organizers, mail slides and other items, which required lifting particle boards weighing approximately 100 pounds a piece on to a bench saw. He contended that all his medical problems were caused or aggravated by his job-related duties.

Appellant submitted a May 1, 1980 report from Dr. Keith W. Harvie, a Board-certified osteopathic orthopedic surgeon, who diagnosed severe degenerative arthritis of the lumbar spine the right knee and the left elbow. In an April 17, 1981 report, Dr. Harvie opined that appellant's conditions were being aggravated by his current job as a carpenter for the employing establishment.

Appellant stopped working on April 28, 1982. In a May 18, 1982 report, Dr. Harvie stated that appellant was unable to perform his duties as a carpenter.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Emmett Altman, a Board-certified orthopedic surgeon, for an examination. In an October 1, 1982 report, Dr. Altman reported that appellant had severe degenerative arthritis of the right knee and lumbosacral spine which preexisted his federal employment. He stated that heavy labor would have aggravated and accelerated the condition to an increased extent as compared to sedentary type work.

In a December 13, 1982 memorandum, an Office medical adviser stated that any aggravation of the arthritis from appellant's employment would have been of a temporary nature. He commented that the natural history of degenerative arthritis was of steady worsening regardless of activity. The medical adviser stated that any work-related aggravation was symptomatic in nature only and ceased with termination of employment.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. David R. Weber, an osteopathic orthopedic surgeon, to resolve the conflict between Dr. Harvie and the Office medical adviser on the extent and duration of the employment-related aggravation of appellant's degenerative arthritis.[1] In his reports, dated November 12, 1984 and December 12, 1984, Dr. Weber stated that appellant's current condition was the natural progression of degenerative arthritis. He concluded that the employment-related aggravation of appellant's arthritis ceased at the time appellant's employment was terminated.

In a February 26, 1985 decision the Office rejected appellant's claim on the ground that the weight of the medical evidence did not establish that appellant had any work-related disability after April 28, 1982. In an accompanying letter, the Office informed appellant of his right to request a hearing before an Office hearing representative if he requested a hearing within 30 days of the Office's final decision. The decision and the accompanying letter were sent to the address that appellant gave in his original claim.

In a November 21, 1986 letter appellant contended that his claim was disallowed despite four doctors who confirmed his disability while four doctors selected by the Office could not agree with each other. Appellant stated that he was confined to a recliner and had to rely on a cane for partial support due to the condition for which he was denied compensation.[2]

In a February 27, 1987 letter the Office informed appellant that if he disagreed with the Office's February 26, 1985 decision, he should exercise the appeal rights attached to the decision.

In a March 10, 1987 letter, appellant stated that no appeal rights had been attached to the copy of the February 26, 1985 decision. Appellant indicated that he was unsure whether all pertinent information concerning his claim had been forwarded by the employing establishment. Appellant repeated his description of the factors of employment which he believed caused his disability, including the lifting of "rental boxes nests" which weighed 300 to 400 pounds each. He stated that he retired because he was unable to continue with the physical demands of his duties. He indicated that he was currently limited to three to four hours of standing followed by two hours of rest.

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[1] The Office previously referred appellant to Dr. Coursen B. Conklin, a Board-certified orthopedic surgeon who failed to clarify his report adequately, and Dr. Altman who had examined appellant previously.

[2] Appellant also raised questions concerning his other claims for bilateral hernias and epilepsy. Those claims are not before the Board on this appeal.

In a March 20, 1987 letter the Office sent appellant a copy of his appeal rights, noting that a statement of appeal rights was sent with each decision issued by the Office. The Office requested that appellant indicate whether he was requesting a hearing, reconsideration or an appeal. The letter was sent to the address to which the Office's February 26, 1985 decision had been sent.

In an April 1, 1987 letter, appellant stated that he could not submit any additional medical evidence. He stated that he would welcome a hearing or reconsideration by the Board.

In an April 9, 1987 letter, the Office requested that appellant indicate whether he wanted reconsideration or a hearing. In an April 13, 1987 letter appellant requested a hearing.

In a July 1, 1987 decision, the Office denied appellant's request for a hearing on the ground that he had not requested a hearing within 30 days of the February 26, 1985 decision. The Office stated that it had considered the matter further in relation to the issue involved and denied his request on the ground that the issue in the case was medical in nature and any additional evidence might be introduced through a request for reconsideration.

The Board finds that the Office properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Federal Employees' Compensation Act provides as follows:

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision on the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary. . . .[3]

The Office's procedures implementing this section of the Act are found in Chapter 2-1601 of the *Federal (FECA) Procedure Manual.* Paragraph 4 of this Chapter, which concerns the preliminary review of a case by an Office hearing representative to determine whether the hearing requested is timely and whether the case is in posture for a hearing, states in pertinent part as follows:

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[3] 5 U.S.C. section 8124(b)(1).

> "If the request was not timely or a reconsideration preceded the hearing request, the Branch will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons." [4]

In this case, the Office issued its decision denying appellant's claim on February 26, 1985. Appellant did not specifically request a hearing until April 13, 1987. Since appellant did not request a hearing within 30 days of the Office's February 26, 1985 decision, he was not entitled to a hearing under section 8124 as a matter of right.

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[5] Specifically the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing,[6] when the request is made after the 30-day period for requesting a hearing,[7] and when the request is for a second hearing on the same issue.[8] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[9]

The Office, in its discretion, considered appellant's request for a hearing in its July 1, 1987 decision and denied it on the ground that the case could be considered under a request for reconsideration upon the submission of additional medical evidence. An abuse of discretion can be shown only through proof of manifest error, a manifestly unreasonable exercise of judgment, action of the kind that no conscientious person acting intelligently would reasonably have taken, prejudice, partiality, intentional wrong, or action against logic.[10] There is no evidence in the case record to establish the Office abused its discretion in refusing to grant a hearing.

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[4] Federal (FECA) Procedure Manual, Chapter 2-1601, paragraph 4.

[5] *Johnny S. Henderson*, 34 ECAB 216 (1982).

[6] *Rudolph Bermann*, 26 ECAB 354 (1975).

[7] *Herbert C. Holley*, 33 ECAB 140 (1981).

[8] *Johnny S. Henderson, supra.*

[9] *See Herbert C. Holley, supra; See also Luis T. Bonnet, Jr.*, Docket No. 85-802 (issued October 11, 1985) and *James W. Croake*, 37 ECAB 219 (1985) in which the Board found that the Office had not abused its discretion in denying hearing requests made after reconsideration under section 8128.

[10] *See Sherwood Brown*, 32 ECAB 1847 (1981) and cases cited therein.

Appellant contended that he did not receive a copy of his appeal rights with his February 26, 1985 decision. The record shows that a letter dated February 26, 1985 setting forth appellant's appeal rights was sent to the same address to which the February 26, 1985 decision was sent. It is presumed that a letter sent in the ordinary course of business is received.[11] It is therefore presumed that appellant received a copy of his appeal rights at the same time he received the February 26, 1985 decision.

The decision of the Office of Workers' Compensation Programs dated July 1, 1987 is affirmed.

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[11] *Edward Thomas Johnson*, 35 ECAB 910 (1985).

In the Matter of George Littleton *and* Civilian Conservation Corps, Pierce, Ida.

Docket No. 87-1427; Submitted on the Record;
Issued March 23, 1988

Before Michael J. Walsh, George E. Rivers, Willie T.C. Thomas

The issues are whether an overpayment occurred in this case because a 3.9 percent consumer price index increase effective March 1, 1983 was incorrectly applied to appellant's attendant's allowance for the period March 1, 1983 to September 29, 1984; and if so, the amount of the overpayment.

On June 5, 1988, appellant, then a 20-year-old employee of the Civilian Conservation Corps, was in a truck accident and sustained injuries resulting in paraplegia. He received compensation thereafter. In 1952 appellant's left leg was amputated and part of his left pelvis was removed due to osteomyelitis. The condition later recurred in his right leg. Appellant began receiving an attendant's allowance on November 1, 1949.[1]

On November 24, 1984 appellant wrote the Office of Workers' Compensation Programs a letter stating:

> "I'm writing to you concerning the letter I received from you in August concerning the changing of the way you pay the

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[1] For appellant's prior appeal to the Board with respect to request for an attendant's allowance for the period January 1, 1979 to May 31, 1981, *see* 33 ECAB 904 (1982).

checks from 12 months to 13 months. You said there would be no difference in the checks. This is not true according to my checks.

"My check I got in September was in the amount of $1,361.54 which is right. My check before 12 months was 1,475.00.

Aug. 1,475.00 x 12 = 17,770.00
Sept. 1,361.54 x 13 = 17,770.02
Oct. 1,327.54 x 13 = 17,258.02
Nov. 1,327.54 x 13 = 17,258.02

"So for October and November my check has been short by $34.00 each month. Somebody had made a mistake somewhere."

The Office responded to appellant in a letter dated March 6, 1985. It stated:

"An audit was done of payments that you have received in recent years and it was discovered that the consumer price index increase effective March 1, 1983 was applied incorrectly by the Office to your compensation payment and your attendant allowance combined. This action caused an overpayment in your case. In addition, the consumer price index increase which was effective March 1, 1984 was not applied until September when the change over was done, causing a slight underpayment. However, the payments you began receiving, in September of 1984 have been reviewed and the amount is correct."

In a subsequent letter dated January 7, 1986 the Office informed appellant that it had preliminarily determined that there had been an overpayment in the amount of $1,023.46 and that the error occurred because the 3.9 percent consumer price index increase was applied to both compensation and to his attendant's allowance through September 29, 1984. The Office also found that appellant was without fault in causing the overpayment.

In a letter received by the Office on January 27, 1986, appellant stated that he did not understand how the Office calculated that he received a $1,023.46 overpayment in compensation. He stated that the overpayment should have been $19.50 a month for 20 months for a total of $390.00. He also contended that his compensation payments had been too low by approximately $55.00 since September 1984.

On February 20, 1986, the Office issued a second preliminary determination finding that the prior overpayment preliminary determination was incorrect and that the overpayment was $455.72.

In a February 25, 1986 letter, appellant stated that he continued to disagree with the amount of the overpayment. He contended that the overpayment was $361.00. He stated that he was willing to repay the overpayment but that he did not want to pay more than he owed. Appellant also stated that the current payment of compensation since September 29, 1984 had been $17.00 a month less than it should have been.

In a July 31, 1986 letter, the Office informed appellant that a second audit had been performed which found that the correct amount of overpayment was $455.72. The Office indicated that appellant's regular four week attendant's allowance continued to be $461.54 and his regular four week compensation payment was $896.00. It stated that appellant's four week check therefore was $1,357.54.

In a letter received by the Office on August 13, 1986, appellant contended that the amount of the overpayment was $380.00. He repeated his contention that his compensation checks since September 1984 had been "short" $17.00 a month.

In a September 25, 1986 letter the Office informed appellant that his compensation was readjusted beginning March 1, 1983 because that was the date the cost-of-living increase was erroneously applied to his attendant allowance. It also indicated that the date payments changed from monthly payments to payments every 28 days was not August 1, 1984 but September 2, 1984. It suggested that this explained appellant's discrepancy in computing his compensation. The Office requested appellant's response on how he wished to handle the overpayment.

In a letter received by the Office on October 7, 1986, appellant contended that the amount of the overpayment was $351.00. He requested an explanation on how the Office calculated an overpayment of $455.72.

On December 22, 1986 the Office in a third preliminary determination found that the correct amount of the overpayment was $799.26. The Office submitted the following in explanation of the overpayment:

"The following is a compilation of the attendance allowance which was actually paid to you and what should have been paid:

"Dates	Amt. paid	Comp due	Att/all. paid
3/1/83-7/31/83	$1,420.00	$910.00	$510.00
8/31/83-2/28/84	$1,475.00	$910.00	$565.00
3/1/84-7/31/84	$1,475.00	$940.00	$535.00
8/1/84-9/1/84	$1,524.15	$940.00	$584.15
9/2/84-9/29/84	$1,361.54	$867.69	$493.85

"Please note the amounts paid to you for an attendant's allowance. It should have been: 3/1/83-9/1/84 at $500.00 per month.

541 days times $500.00 divided by 30 equals	$9,016.67
9/2/84-9/29/84 28 days at 460.54	$461.54
Total	$9,478.21

"You were actually paid for an att./all. the following:

	amt.	days	total
3/1/83-7/31/83	$510.00	150	$2,550.00
8/1/83-2/28/84	$565.00	210	$3,955.00
3/1/84-7/31/84	$535.00	150	$2,675.00
8/1/84-9/1/84	$584.15	31	$603.62
9/2/84-9/29/84	$493.85	28	$493.85
			$10,277.47
You should have received			$9,478.21
			$799.26"

In a letter received by the Office on December 22, 1986, appellant submitted a check and stated that the check represented the first payment toward the $351.00 he owed to the Office as he had explained previously. Appellant subsequently sent checks to the

Office totaling $351.00. In subsequent letters, appellant disagreed with the Office calculations of the overpayment.

In a March 10, 1987 decision, the Office found that appellant had received an overpayment of $799.26 and had repaid $351.00 leaving an overpayment of $448.26. The Office further found that the circumstances of appellant's case did not warrant waiver of recovery of the overpayment because he had not requested a hearing and had submitted payments.

Appellant through his attorney appealed the March 10, 1987 overpayment decision to the Board contending:

> "1. The Office erroneously applied a 3.9 percent cost of living increase effective March 1, 1983 to the aggregate sum of monthly compensation benefits and attendant allowance of $420.00 per month instead of just to the compensation benefits of $920 per month.
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> "2. An overpayment of about $20.00 per month for 17 months, from March 1, 1983 through July 31, 1984 or $340.00 resulted from the above error by the Office.
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> "3. This error was compounded by an underpayment of benefits in August and September of 1984.
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> "4. The OWCP computed the overpayment based on figures which are incorrect.
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> "5. For the period August 1, 1984 through September 1, 1984 OWCP should have paid appellant $1,455.00 for the month of August plus one day at the same rate for September 1, 1984. Appellant received $1,361.54 despite the fact that the switch to a 28-day payment cycle did not become effective until September 2, 1984. This error caused an underpayment of $141.30 ($1,502.41—$1,361.54).
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> "6. The July 31, 1986 letter from OWCP stated that appellant was to receive a regular four week attendance allowance of $461.54 and a regular four weeks compensation payment of $896.00 for a total four weeks compensation payment of $1,357.54. Appellant actually received $1,327.54.
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> "7. Appellant returned $351.00 to OWCP and is entitled to reimbursement from OWCP of $170.30 for underpayment of compensation."

The Board finds that the case is not in posture for decision as to whether an overpayment occurred and the amount of such overpayment.

Appellant in his letter to the Office dated March 6, 1985 informed the Office that the check he received in August 1984 prior to the change over from a 12 to 13 payment system was $1,475.00; that in September 1984 he received a check for $1,361.54; and thereafter he received checks for $1,327.54. He contended that he was being underpaid $34.00 per month. The Office did not address appellant's contention of underpayment for August and September 1984 or adequately demonstrate the basis for its determination that the four weeks payment received by appellant commencing August 1984 were correct. In addition, the Office in its March 6, 1985 response stated "the consumer price index increase which was effective March 1, 1984 was not applied until September when the change over was done, causing a slight underpayment." The amount of this underpayment and the calculations showing how it was applied to reduce the overpayment for the period March 1983 through September 1984 is not apparent and should be explained.

The Office has also conducted two audits of appellant's record and arrived at three different overpayment figures, to wit: $1,023.46; $455.72; and $799.26. None of the Office's calculations clearly demonstrate the amount of overpayment for each monthly or four weeks period reduced by the amount of any underpayment nor appellant's correct rate of monthly or four weeks' compensation during the relevant periods in dispute in this case.

The Board concludes that this case must be remanded to the Office for further development and a *de novo* decision with detailed findings as to how the Office calculated an overpayment in this case and findings with respect to whether appellant was paid and whether he continues to be paid the correct amount of compensation during the periods where the alleged overpayment occurred.

The decision of the Office of Workers' Compensation Programs dated March 10, 1987, is hereby set aside and the case remanded for further development consistent with this decision of the Board.

In the Matter of CHARLES L. ZANE *and* U.S. POSTAL SERVICE, POST OFFICE, West Palm Beach, Fla.

Docket No. 87-1626; Submitted on the Record;
Issued March 23, 1988

Before MICHAEL J. WALSH, GEORGE E. RIVERS, WILLIE T.C. THOMAS

The issue is whether the June 5, 1987 Office of Workers' Compensation Programs' decision in which it refused to authorize payment for chiropractic treatment expenses, or the August 6, 1987 Office decision in which it refused to authorize payment of a lump sum settlement, complied with the requirements of the applicable law so as to constitute a final decision.

On November 15, 1956 appellant, then a 28-year-old letter carrier, sustained a low back injury while in the performance of his assigned duties. On December 14, 1956 the Office accepted appellant's claim for back strain and awarded compensation.[1]

By report dated March 21, 1957 Dr. Raymond S. Roy, a general practitioner, diagnosed a herniated disc and recommended a laminectomy and spinal fusion. Appellant refused surgery at that time and returned to work.

By a CA-20 attending physician's report dated December 20, 1957 Dr. W. F. Ande, a general practitioner, diagnosed a ruptured intervertebral disc and noted that the pain would be permanent unless surgery was performed. A neurosurgeon, Dr. James F. Cooney, noted in a February 10, 1958 report that a myelogram revealed an extruded lumbosacral disc and concurred with the recommendation for surgical care. On February 11, 1958 appellant underwent a laminectomy and was discharged from active treatment on April 25, 1958. The Office of Workers' Compensation Programs accepted the condition of ruptured disc.

On January 1, 1974 appellant slipped off a curb jamming the heel of his right foot rendering him disabled for regular duty. The Office accepted appellant's claim for aggravation of a preexisting calcaneal heel spur and awarded compensation. Appellant returned to regular duty in late March 1974.

On October 4, 1974 an Office medical adviser opined that appellant's back condition on May 20, 1974 was causally related to his

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[1] The Board notes that, although the case record contains medical evidence dating from 1957 to the present, the factual portion of the case record lacks all evidence predating June 1981.

November 15, 1956 accepted employment injury, that his accepted January 1, 1974 aggravation of a calcaneal heel spur was of a permanent nature, but that appellant was not disabled from all employment. By a CA-20 attending physician's report dated April 8, 1975 Dr. Gerald K. Shorty, an orthopedic surgeon, opined that appellant was disabled from any job requiring long standing or walking.

Appellant retired on disability effective May 21, 1975.

On March 28, 1979 appellant was hospitalized for complaints of recurrent back pain; an admission history noted that he had retired from the employing establishment in 1974 because of his back problems. Dr. Albert F. Auld, an orthopedic surgeon, diagnosed possible lumbar epidural entrapment syndrome and a herniated disc at L4-L5; he performed a decompression lumbar laminectomy and discectomy at L4-L5 and bilateral L4-L5 foraminotomies with nerve root decompressions and scar tissue removal. Discharge diagnosis was lumbar spondylosis of L4-5.

By compensation order dated May 7, 1979 the Office found that appellant's disability after October 11, 1978 was not due to his November 15, 1956 employment injury and suspended compensation benefits.

By report dated October 11, 1979 Dr. Oliver L. Jones, Jr., an Office referral orthopedic surgeon, noted that appellant had residuals from osteoarthritis and his lumbar laminectomies and a resultant 15 percent whole body impairment, and he opined that appellant could perform light duty with bending and lifting restrictions.

On January 14, 1980 appellant's benefits were reinstated.

By OWCP-5 form dated May 29, 1981 Dr. Jones indicated that appellant had reached maximum improvement and could work limited duty with lifting, bending, and twisting restrictions for six hours a day.

On June 17, 1981 an Office medical adviser opined that appellant had severe physical restrictions that precluded remunerative employment.

On February 25, 1982 Dr. Daniel W. Spurlock, a general practitioner, opined that appellant was totally and permanently disabled.

By report dated July 27, 1982 Dr. Jones restated his 1981 opinion that appellant had reached maximum improvement and could perform sedentary light duty with activity restrictions.

On August 30, 1982 the Office referred appellant for vocational rehabilitation services. Appellant informed the rehabilitation counselor that he felt, as did his private physician, Dr. Spurlock, that despite what Dr. Jones said, he remained totally and permanently disabled and unable to perform light duty, and that he felt he would not be significantly better off after taxes by taking a six-hour limited-duty job and receiving two hours of compensation than by remaining off work and receiving full tax-free compensation benefits. Vocational rehabilitation was discontinued on September 22, 1982.

Recognizing a conflict in medical evidence, the Office referred appellant to an impartial medical examiner for evaluation and resolution of the conflict. By report dated February 11, 1983 Dr. Irving G. Manning, a Board-certified orthopedic surgeon, opined that although appellant manifested a large psychogenic overlay he was able to return to a limited light-duty position for four to six hours a day.

By letter dated April 20, 1983 the Office advised appellant that Dr. Manning found him capable of performing limited work, that a partially disabled employee who refuses or neglects suitable work is not entitled to compensation, and that it was his responsibility to seek suitable work.

By letter dated June 27, 1983 the employing establishment offered appellant a limited-duty assignment that had been approved by Dr. Manning. Appellant did not accept the job, citing his physician's advice, and requested that the Office determine his wage-earning capacity.

By compensation order dated September 15, 1983 the Office terminated compensation benefits because of appellant's refusal of suitable work.

By letter dated September 22, 1983 appellant requested a hearing on termination of his compensation benefits, alleging that the Office and employing establishment failed to follow applicable guidelines.

A hearing was held on January 9, 1984 and by decision dated and finalized May 8, 1984 the Office hearing representative found that appellant had failed to accept a suitable work offer without an acceptable reason and affirmed the termination of his compensation benefits.

By letter dated July 23, 1984 appellant appealed the May 8, 1984 decision to the Board, citing Office and employing establishment procedural irregularities.[2]

By Order dated October 17, 1984 the Employees' Compensation Appeals Board remanded the case to the Office for further reconsideration and proper application of 5 U.S.C. section 8106(c)(2) as set forth in FECA Bulletin No. 83-51, issued October 24, 1983.[3] Appellant's compensation benefits were reinstated effective December 1, 1984.

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[2] This appeal was docketed No. 84-1948 (issued October 17, 1984).

By letter dated April 9, 1985 appellant requested that his congressional representative research the Office criteria for lump sum payment of his compensation benefits.

By letter dated May 6, 1985 the Office advised that appellant's case was not in posture for a lump sum settlement because it had not been determined that his medical condition had reached a permanent and fixed state. In a June 5, 1985 letter the Office detailed the conflicting findings on the extent of appellant's disability between appellant's family physician on one side and the Office referral orthopedic surgeon and the impartial medical examiner on the other, and noted that the criteria for awarding a lump sum settlement was the "best interest of the claimant" and the permanence of the disability.

By letter dated June 12, 1985 the Office advised appellant that it had reviewed the employing establishment's proposed modified light-duty job offer as a distribution clerk, found it suitable for his partially disabled condition, and advised him of the consequences should he decline the suitable work without reasonable justification.

By letters dated May 9 and July 12, 1985 appellant advised the Office and the Board that the Office of Personnel Management had certified him as being permanently disabled and that his family physician had concurred.

By report dated August 19, 1985 Dr. Manning noted that appellant had reached maximum improvement, that he could work at limited light duty with bending and lifting restrictions beginning with four hours a day, and that he had a psychiatric overlay.

By letter dated November 25, 1985 appellant submitted extensive financial documentation and worksheets based on lump sum investment and noted that every financial planner he contacted had advised him to seek lump sum payment of his monetary entitlement.

On December 26, 1985 the employing establishment offered appellant the position of modified distribution clerk; appellant consulted his family physician, Dr. Spurlock, who advised him to not attempt the proffered employment, so appellant declined the job offer citing Dr. Spurlock's advice.

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[3] As detailed in FECA Bulletin No. 83-51 the Board notes that it is the responsibility of the Office as the adjudicating agency under the Act (and not the employing establishment) to make the determination of whether the offered position is suitable, and to inform appellant of the consequences of a refusal of suitable work before such an offer is made. *See Ralph Trevino*, 35 ECAB 1181 (1984).

By letter dated February 27, 1986 the Office provided Dr. Manning's evaluations and requested that Dr. Spurlock provide medical rationale supporting his opinion of the nature of appellant's disabilities.

By response dated March 11, 1986 Dr. Spurlock noted that "[appellant] has persistent low back pain. Has marked limits in spinal range of motion (10%) straight leg lifts are positive bilaterally, ankle jerks are absent. Based on these findings I feel he cannot do gainful employment."

In a March 27, 1986 response to an inquiry the Office noted that it was unable to make a decision concerning appellant's lump sum settlement at that time, because appellant had refused suitable work on the advice of his physician and therefore needed to be rated for his loss of wage-earning capacity based on his established work restrictions. The Office noted that after the evaluation and rating if appellant still desired a lump sum, it would be considered.

By report dated April 14, 1986 Dr. Manning noted that appellant was "essentially the same," that appellant's straight leg raising test sitting and supine was normal, and that his ankle jerks were diminished but came out with reinforcement, and he opined that although appellant was essentially the same as before, in view of the fact that appellant had been out of work for so long, he doubted that appellant would ever go back to work.

On May 27, 1986 an Office medical adviser reviewed the record and opined that appellant should be capable of sedentary work from four to eight hours a day.

By memorandum for the District Director dated August 8, 1986 the Office noted that "the decision on [appellant's] loss of wage-earning capacity will be released in August. Upon completion of the loss of wage-earning capacity determination, request the lump sum calculation [appellant] has requested."

By letter dated August 8, 1986 from the District Office Director to appellant's Congressman the Office advised that evidence showed that appellant was not totally disabled but was permanently partially disabled, that the Office was in the process of adjusting appellant's entitlement to reflect his current partial disability, and that appellant would receive a formal decision concerning his future periodic entitlement by the end of August 1986. The Office noted that the approximate lump sum based on the adjusted compensation entitlement would be calculated shortly thereafter and appellant would be notified of the amount. The Office further explained that it was appellant's responsibility to demonstrate that a lump sum settlement would be in his best financial interest, that the purpose of periodic payments was to ensure that beneficiaries have a continuing source of income to offset the loss of wages, and that periodic compensation payments were increased when triggered by rises in the consumer Price Index, were free from attachment by creditors, were free from speculation and fluctuation, and were generally considered free from taxes. The Office advised that in general, financial plans which rely solely on return from investments that were not guaranteed and were subject to market fluctuations were not considered adequate to provide the financial security required by the Office to be in a claimant's best financial interest.

In a memorandum to file dated August 18, 1986 an Office claims examiner found that appellant had no wage-earning capacity and was totally disabled for all remunerative employment.

By memorandum dated September 8, 1986 the District Director requested that the Office statistician calculate a lump sum settlement for appellant based on an entitlement for total disability of $1,503.00 each four weeks with a commutation date of January 3, 1987.

By memorandum dated September 29, 1986 the Branch of Special Claims acknowledged the District Director's request for calculation of benefits, noted the return of the file for completion of development in accordance with FECA Bulletin 85–34, and requested that upon completion of all appropriate development the file should be returned to the National Office for decision.

By memorandum dated October 20, 1986 the statistician provided the computed value of future compensation benefits due appellant based on a yearly compensation rate for total disability of $19,359.00. No calculations were provided.

By letter dated January 12, 1987 the Office advised appellant that the lump sum settlement method may be used under rare and exceptional situations where a beneficiary can show that more financial security will result after the settlement is made, that there was nothing in appellant's file sufficient to justify a lump sum settlement, and that in the absence of convincing justification for such a settlement the matter would not be considered further. Additionally the Office noted that lump sum settlements do not take into account cost-of-living increases payable under the periodic payment system, and are discharged by payment equal to the present value of all future payments less four percent discount compounded annually.

In a March 10, 1987 report Dr. Michael E. Nathanson, a chiropractor, noted that appellant was being treated for a severe low back condition that was a direct consequence of his November 15, 1956 injury and subsequent surgeries.

By letter dated June 5, 1987 an Office voucher examiner advised appellant that since his accepted condition was a ruptured disc and since chiropractic treatment could only be authorized for subluxation of the spine, the Office could not authorize payment of appellant's chiropractic treatment expenses.

On July 7, 1987 appellant appealed the June 5, 1987 voucher examiner's rejection of payment of appellant's chiropractic treatment expenses. The appeal was docketed No. 87-1626.

By letter dated August 6, 1987 the Office advised appellant's Congressman that a lump sum settlement for appellant was not feasible without submission of sufficient justifying information.

On August 25, 1987 appellant appealed to his Congressman for assistance with respect to the August 6, 1987 letter the Office sent to him noting that it contradicted the Director's August 8, 1986 letter to the Congressman which the Director "promised a resolution of lump sum payment in my favor shortly after the end of August 1986."

The Board finds that none of the letters or memoranda from the Office dating from October 17, 1984, the date the Board remanded the case to the Office for reconsideration under 5 U.S.C. section 8106(c)(2) and FECA Bulletin 83-51, constitute a final decision pursuant to the requirements of 20 C.F.R. section 10.130.

Section 10.130 of part 20 of the Code of Federal Regulations provides in pertinent part:

> "The Federal Employees' Compensation Act, as amended, requires determination of a claim, with findings of fact and a decision for or against the payment of compensation. . . . The decision shall contain findings of fact and a statement of reasons." [4]

In the present case the Board remanded the case to the Office for proper application of the regulations governing a partially disabled claimant and an offer of suitable work. In accordance with the above-mentioned procedures the Office on June 12, 1985 advised appellant that it had determined the employing establishment's modified distribution clerk position was suitable based upon appellant's disability and medical reports on record, and apprised him of the consequences of refusal of suitable work.

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[4] 20 C.F.R. section 10.130 (April 1, 1987); *See also Ernesto L. Montoya*, 35 ECAB 205 (1983).

On December 26, 1985 the employing establishment offered the job to appellant and appellant declined the offer citing Dr. Spurlock's advice. In March 1986 the Office requested that Dr. Spurlock provide a rationalized medical opinion supporting his opinion and in response Dr. Spurlock provided three sentences which noted that appellant had persistent low back pain, marked limits of spinal range of motion, positive straight leg lifts, and absent knee jerks, and therefore Dr. Spurlock felt that appellant could not do gainful employment. No detailed description of the nature and extent of appellant's disability was provided and no reasons for appellant's inability to perform the specific modified distribution clerk duties were discussed. Mere generalized contentions by a general practice physician unsupported by examination or test results or by a complete and rationalized medical opinion on the extent of appellant's disability are not probative on the issue of appellant's inability to perform specific duties,[5] particularly where an impartial medical examiner Board-certified in the applicable specialty had found, based on a complete review of pertinent medical records and a thorough examination of appellant, that appellant could perform the specific duties in question.[6] No further clarification of Dr. Spurlock's opinion was sought, and no final decision on the issue of whether appellant properly refused suitable work was rendered.

The Office instead noted that because appellant had refused suitable work on the advice of his physician, he needed to be rated for his loss of wage-earning capacity based on his established work restrictions. To that end, the Office had Dr. Manning, the impartial medical examiner, reevaluate appellant's disability. Dr. Manning found that appellant was essentially the same, that his leg raising test was normal, and that his ankle jerks were diminished but came out with reinforcement. These findings were the opposite of Dr. Spurlock's findings with respect to the leg raises and the ankle jerks. However, Dr. Manning opined that since appellant had been out of work for so long, he doubted whether appellant would ever go back to work.

Nevertheless, in May 1986 an Office medical adviser reviewed the record and opined that appellant should be capable of sedentary work for four to eight hours a day. By internal correspondence dated August 8, 1986 the Office noted that a decision on appellant's loss of wage-earning capacity would be released in August. Also by letter to appellant's Congressman that date the Office advised that it was in the process of adjusting appellant's entitlement to reflect his current partial disability and that appellant would receive a formal decison on his future entitlements by the end of August 1986. However, the case record contains no evidence that appellant's entitlement to compensation was ever adjusted to reflect a partial disability status or that a final decision on the issue of loss of wage-earning capacity was ever made.

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[5] *See Mary C. West*, 31 ECAB 606 (1980).

[6] *See James L. Haye*, 36 ECAB 128 (1984); *John R. Walker*, 36 ECAB 267 (1984); *John Wilkes, Jr.*, 36 ECAB 451 (1985).

Instead, in another internal memorandum to file dated August 18, 1986 an Office claims examiner found that appellant had no wage-earning capacity and was totally disabled for all employment, despite the May 1986 opinion of the Office medical adviser who had concluded that appellant was only partially disabled.

Subsequently a lump sum determination based on total disability was requested, despite the fact that appellant's continued entitlement to any compensation benefits had not been finally determined, nor had any adjusted entitlement to partial disability benefits been finally determined.

In a January 12, 1987 letter the Office advised appellant that there was nothing in appellant's file sufficient to justify a lump sum settlement and that in the absence of convincing justification such a settlement would not be considered. The Office had advised in 1986 that financial plans relying on investments were not considered adequate to provide the financial security required for the claimant's "best interest."

By letter dated June 5, 1987 the Office refused payment for unauthorized chiropractic treatment expenses, but no final decision on the issue of whether the chiropractic treatment expenses were authorized was made. Appellant appealed this denial.

In an August 6, 1987 letter the Office advised appellant's Congressman that a lump sum settlement for appellant was not feasible without submission of sufficient justifying information. However, no final decision on this issue was made, nor could one be made until a final decision on the issue of whether appellant refused suitable work and was therefore not entitled to any compensation was made, and until a final determination of appellant's loss of wage-earning capacity and consequent adjustment of his compensation benefits were made.

Because appellant is entitled to a final decision made in accordance with the applicable law on each issue heretofore noted,[7] the case will be remanded for *de novo* consideration, and preparation of proper compensation orders with appropriate findings of fact and rationale on each relevant issue beginning with the determination under 5 U.S.C. section 8106(c)(2) as set forth in FECA Bulletin No. 83-51 of whether appellant properly refused suitable work.

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[7] *See Ernesto Montoya, supra,* note 4; *see also Joseph Skiba,* 31 ECAB 1263 (1980); *Antoinette J. Radson,* 31 ECAB 1265 (1980).

The case is remanded to the Office of Workers' Compensation Programs for further proceedings to be handled as expeditiously as possible and a *de novo* decision consistent with this decision of the Board.

In the Matter of LINDA F. GREEN *and* U.S. POSTAL SERVICE, POST OFFICE, Long Beach, Calif.

Docket No. 87-1667; Submitted on the Record;
Issued March 24, 1988

Before GEORGE E. RIVERS, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether appellant received an overpayment of compensation for the period from April 25, 1980 to November 22, 1986 on the basis that she received compensation at the augmented rate for employees with dependents but had no dependent during this period.

On October 6, 1972 appellant, then a 23-year-old letter carrier, filed a claim for a sprained right ankle, skinned knees, and a lump and bruise on her right forearm sustained on October 5, 1972 when she stepped in a hole, twisted her ankle, and fell. Following this injury appellant received compensation for the intermittent periods she missed from work and for portions of days when she worked part time.

On May 31, 1974 appellant underwent sugery on her right ankle, for the diagnosed condition of "synovitis and chondritis of the right ankle joint plus neuritis of superficial nerve due to a neuroma."

In response to an inquiry from the Office of Workers' Compensation Programs regarding a change in her surname, appellant submitted a marriage certificate showing she was married on December 7, 1974.

Thereafter the Office paid appellant's compensation at the augmented rate for an employee with a dependent. Payments at the augmented rate included a period of temporary total disability, a schedule award for a 25-percent permanent loss of use of the left leg paid from March 27, 1975 to August 11, 1976, and compensation for loss of wage-earning capacity for the period beginning August 12, 1976.

In an October 29, 1979 letter the Office asked appellant if she was still married and claiming dependents, noting that on her most recent Office form completed on September 5, 1979 she did not claim any dependents. The Office advised appellant that having dependents was "the basis of augmented compensation." By a November 21, 1979 letter appellant advised the Office that she was still married.

On an Office form which she completed on November 22, 1981 appellant indicated that, as a dependent, she had a husband who was a member of her household.

Appellant accepted an offer of reemployment with the employing establishment and began such employment under its rehabilitation program on March 19, 1983. As appellant's reemployment was at the same grade and step as when she left, the Office terminated her compensation on March 19, 1983.

On May 3, 1985 appellant stopped work; she filed a claim for a recurrence of disability. The Office resumed payment of compensation at the augmented rate for employees with a dependent, which it continued to pay for the intermittent periods she missed from work and for portions of days when she worked part time, and for temporary total disability after she stopped work on February 18, 1986.

On an Office form she completed on July 5, 1986 appellant indicated that she no longer was claiming additional compensation because of dependents on the basis that she was divorced on February 5, 1980. She submitted a divorce decree showing her divorce became final on April 25, 1980.

By a preliminary decision dated February 26, 1987 the Office determined that appellant had received an overpayment of compensation in the amount of $3,848.76 which arose because she was not entitled to augmented compensation after her divorce was final on April 25, 1980 but was paid compensation at the augmented rate until November 22, 1986. The Office also preliminarily determined that she was at fault in the matter of the overpayment on the basis that she was aware or reasonably should have been aware she had no qualified dependent.

By a March 13, 1987 letter appellant requested reconsideration, contending that from 1980 through 1986 her father was wholly dependent on her for support. Appellant stated:

> "My father suffered a heart attack and was not working and had no medical coverage, and he came to live with me in 1980 through 1986. He was totally dependent on me for full support and care during these years."

Appellant submitted a March 11, 1987 letter from her father who stated:

> "During the period from January 1980 through February 1986 I was dependent solely on my daughter Linda due to suffering a heart attack and was unable to work or had no income nor insurance benefits and was forced to reside with her. . . .
>
> "Through the help from Linda and some wonderful private organizations I was able to recover from a hopeless case to a productive person again and back on my feet and supporting myself."

By final decision dated June 25, 1987 the Office determined that appellant had received an overpayment of compensation in the amount of $3,848.76 which arose because she was not entitled to augmented compensation after her divorce was final on April 25, 1980 but was paid compensation at the augmented rate until November 22, 1986. The Office also determined that the circumstances of appellant's case did not warrant waiver of the overpayment.

The Board finds that the case is not in posture for decision.

Section 8110(b) of the Federal Employees' Compensation Act[1] provides that a disabled employee with one or more dependents is entitled to have his basic compensation for disability augmented at the rate of eight and one-third percent of his monthly pay. Section 8110(a) defines what constitutes a "dependent" under the Act, with subsection (2) including "a husband" under specified circumstances, and subsection (4) including "a parent, while wholly dependent on and supported by the employee."

The Board finds that the Office properly determined that appellant was not entitled to augmented compensation after April 25, 1980 for a husband. After her divorce became final on April 25, 1980 her former husband is no longer considered a dependent under section 8110(a)(2) of the Act.[2]

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[1] 5 U.S.C. section 8110.

[2] 5 U.S.C. section 8110(a)(2) provides that a husband is a dependent if he is a member of the same household if he is receiving regular contributions for his support from the employee, or if the employee has been ordered by a court to contribute to his support. However, after a decree of divorce becomes final, the former spouse no longer qualifies as a "dependent" under section 8110. *William S. Cappeller*, 28 ECAB 262 (1977).

The Board finds, however, that further development of the evidence is needed on the issue of whether appellant was entitled to augmented compensation for a "wholly dependent" parent after April 25, 1980.

After the Office's preliminary decision but before its final decision that she had received an overpayment of compensation on the basis that she had no "dependent" after April 25, 1980, appellant submitted a letter contending that her father was wholly dependent on her for support from 1980 to 1986. She submitted a letter from her father supporting this contention. In the absence of any contrary evidence, it was improper for the Office to issue its final decision that appellant received an overpayment of compensation because she did not have a "dependent." It was incumbent upon the Office to consider all the evidence on persons appellant contended were dependents before issuing a decision that she did not have a dependent and therefore was not entitled to augmented compensation.

The decision of the Office of Workers' Compensation Programs dated June 25, 1987 is set aside and the case remanded to the Office for further investigation of the appellant's contention that her father was "wholly dependent" on her from April 25, 1980 to sometime in 1986, to be followed by a *de novo* decision on this issue and on the existence of any overpayment of compensation during the period from April 25, 1980 to November 22, 1986.[3]

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[3] The Office should consider an additional letter from appellant's father submitted on appeal. This letter cannot be considered by the Board on appeal since the Board's review is limited by its Rules of Procedure, at 20 C.F.R. section 501.2(c), to "the evidence in the case record which was before the Office at the time of its final decision."

In the Matter of CHERIE L. HUTCHINGS *and* U.S. POSTAL SERVICE, POST OFFICE, Sacramento, Calif.

Docket No. 88-505; Submitted on the Record;
Issued March 24, 1988

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHELE VON KELSCH

The issue is whether appellant's contact dermatitis condition was sustained in the performance of her federal employment.

On May 4, 1987 appellant, then a 51-year-old equal employment opportunity counselor, filed a claim alleging that on April 29, 1987 while on a temporary duty assignment in Reno, Nevada, she developed an allergic reaction, contact dermatitis, causing a rash on both arms, face, neck, left shoulder and right leg. On the reverse of the claim form appellant's supervisor noted that appellant had given notice of her claim on May 4, 1987 and that appellant had stopped work on May 1, 1987. In an attached statement, appellant reported that she had checked into the Peppermill Hotel in Reno on April 28, 1987. When she awoke the next morning she noticed a rash on her arm.

Appellant explained her condition during the temporary duty assignment as follows:

> "I was on assignment for EEO Investigations to the Reno Post Office and checked in at the Peppermill Hotel. I left Sacramento for Reno on Tuesday, April 29, 1987 at 6:45 am, after picking up a government car at the Landmark Building where Human Resources is located. I arrived in Reno at approximately 9:15 am. I went to the Main Post Office at 2000 Vassar St. to pay a courtesy call to Postmaster Evans and the MSC Dir. E&LR. I then went to the Downtown Post Office where I had scheduled appointments for taking affidavits beginning at 11:00 am. I remained at the Downtown Post Office until approximately 4:30 p.m. I then went to the Peppermill Hotel where I had a confirmed reservation for two days.
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> "I was not very hungry so I went to the grocery store and bought some cottage cheese and peaches for my dinner.
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> "During the night, I awakened myself noticing that I was scratching myself, in particular, both arms. This was Tuesday night/morning, April 28/29. I showered and went back to the Downtown Post Office as I had two scheduled EEO investigations with appointments. I finished taking all the necessary affidavits and record research approximately at 4:00 p.m.
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> "During the night, I again noticed that I was scratching my arms a great deal. When I woke up, I noticed that I had quite a large rash on both arms. I had planned to check out and did so, but I also called to the attention of the Peppermill management that I had a rash on my arm, thinking it could have been an insect bite which might require medical attention.
>
> "I had never experienced this rash before and had no idea of what it was. Initially, I did not pay any immediate attention to it because I did not know anything would come of it since I did not have that experience before.

> "I checked out of the Peppermill Hotel in Reno and departed for Sacramento at approximately 9:30 a.m."

Appellant, in support of her claim submitted the employing establishment's health unit's notes pertaining to her care and treatment on April 30, 1987. The records note that appellant was treated at 3:00 p.m. for "reaction to bites on forearm." Appellant was treated with Ziradryl and CTM.

Appellant also submitted a medical form report dated May 4, 1987 prepared by Dr. C. Shiba at the "Med-Center," emergency medical care center. Dr. Shiba reported findings of contact dermatitis, prescribed atarax and kenalog cream, and released appellant from work on May 4, 1987 with return to usual work on May 5, 1987.[1]

Dr. Daniel I. Lang Newman, a physician at the Med-Center, Board-certified in internal medicine, examined appellant on May 4, 1987 and submitted a report stating as follows:

> "Ms. Hutchings was seen on May 4, 1987 when she reported a six-day history of a rash on her neck, arms, and face. She suspected that she had been bitten by an insect while on assignment on her left arm. She complained of itching, nausea, and disequilibrium since that time.
>
> "Examination revealed a maculopapular rash in the abovementioned areas. Though the rash appeared to be consistent with contact dermatitis, it has not, up to this point, been possible to determine precisely what the etiology of this eruption was."

Appellant also submitted an emergency room record pertaining to her care on May 5, 1987. The record notes appellant's complaints of dizziness and provides a diagnosis of acute hypertensive episode.[2]

On May 8, 1987 Dr. Kali S. Eswaran, Board-certified in internal medicine, reported that appellant had been examined on that day and that her medical problems were acutely aggravated by the allergic rash and required medication.

On May 12, 1987 Dr. Eswaran submitted a medical report in which he noted appellant's history of injury as "patient seen in postal medical unit, prescribed antihistamines which caused a causal effect with allergic reaction with medication prescribed by medical center on May 4, 1987, also interacting with hypertension." Dr. Eswaran reported his findings as hypertension, poison oak, drug reaction, and found appellant disabled from work May 1, 1987 until May 9, 1987.

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[1] Appellant was referred to the "Med-Center" on May 4, 1987 by the employing establishment's health unit after she experienced dizziness and nausea from May 1, 1987 through May 4, 1987.

[2] Dr. G. Hallman, Board-certified in emergency medicine, also submitted a report on May 12, 1987 in which he simply noted that he examined appellant on May 5, 1987.

The Office wrote to appellant on May 26, 1987 and requested that she describe in detail exactly how her condition occurred, the immediate effects, whether another injury was sustained, and why she delayed in seeking medical attention.

On June 2, 1987 the appellant responded to the Office stating that after she returned home to Sacramento on April 30, 1987 she reported the rash to her supervisor, who advised her to seek treatment at the employing establishment's health unit. Appellant was prescribed eight antihistamines. Appellant stopped work and returned home. She then took the medication and became nauseated and dizzy throughout the night of April 30, and the following two days. Appellant returned to work on Monday, May 4, 1987, and was still experiencing nausea and dizziness. She was again directed to go to the employing establishment's health unit by her supervisor. The nurse at the health unit referred appellant to her private health clinic. The appellant was prescribed more antihistamines and became disabled after taking the prescribed dosage on May 5, 1987.[3]

On June 3, 1987 the appellant submitted a Form CA-3 which reported that she had been paid continuation of pay benefits from May 1, 1987 until May 8, 1987.

By letter compensation order, on July 29, 1987 the Office denied appellant's claim finding that appellant had not met her burden of proof to establish that her contact dermatitis was causally related to her federal employment.

On August 26, 1987 appellant requested reconsideration and submitted an unsigned medical report pertaining to a medical examination on May 8, 1987. The medical note recorded a diagnosis of high blood pressure, poison oak, high serum chloresterol, asthma and sciatica.[4] Appellant also submitted a medical report from Dr. Eswaran dated August 20, 1987 which stated as follows:

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[3] The Office has not developed the case record, nor issued a final decision regarding appellant's disability subsequent to the May 5, 1987 drug reaction.

[4] Medical reports which are not signed by a "physician" as defined by 5 U.S.C. section 8101(2), cannot be considered as evidence, see *Bradford L. Sutherland*, 33 ECAB 1568 (1982).

> "The patient presented to my office with complaints of rash on her face and both arms. She states that she was seen in the medical unit where she is employed, who referred to a medical clinic down the street for treatment of the rash. At this medical clinic she was given a prescription for antihistamines as prescribed over the next 72-hour period with no improvement in the rash, only with added symptoms of dizziness and synocopal episodes. According to the patient and in speaking to the medical unit supervisor the patient had a synocopal episode resulting in a trip in an ambulance to the local emergency room where her blood pressure was documented to be 250/150, at that time she was given Lopressor for control of the hypertension but the antihistaminc was not suspected to be the cause. The patient was seen in my office on May 8, 1987, at that time the antihistamines were discontinued, the Lopressor and tenormin were discontinued. The patient was given Vasotec 5 mg lg daily, Hydroxyzine 25 mg 06hr PRN, and Triamcinolowc ointment 0.1 percent to be applied to the affected areas as needed.
>
> "I feel the patient was most likely infected with this rash while on assignment in the Reno area. It is also felt the antihistamines that she was given had a causal effect and aggravated and possibly caused her uncontrolled hypertension, which was the cause of her synocopal episode while she was working in her office in Sacramento."

In a November 13, 1987 decision, the Office denied modification of it prior order on the ground that appellant submitted insufficient evidence.

The Board finds that appellant's contact dermatitis is not causally related to factors of her federal employment.

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that her condition is causally related to factors of her federal employment. Where an employee is on a temporary duty assignment away from her regular place of employment, she is covered by the Federal Employees' Compensation Act 24 hours a day with respect to any injury that results from activities essential or incidental to her temporary assignment.[5] However, the fact that an employee is on a special mission or in travel status during the time a disabling condition manifests itself does not raise an inference that the condition is causally related to the incidents of the employment.[6]

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[5] *Richard Michael Landry*, 39 ECAB 232 (1987).

[6] *Stanley K. Takahashi*, 35 ECAB 1065 (1984).

In *William B. Merrill*,[7] the Board reviewed the claim of a federal employee who, on a temporary duty assignment, awoke in his motel room and discovered that the vision in his right eye was blurred, and was later diagnosed as suffering from a central retinal artery occlusion of the right eye. The Board noted that if the eye condition had resulted from activities incidental to his employment, the injury would have been compensable. The Board found, however, that there was no medical opinion showing a causal relationship between the eye condition to the factors of appellant's employment. Appellant's condition occurred spontaneously.

In the instant case, appellant discovered the rash, during the night of April 28 and 29, 1987 while she was on a temporary duty assignment. Appellant had travelled from her home to her temporary duty assignment on April 28, 1987. There is no medical evidence of record showing a causal relationship between her skin condition and factors of appellant's employment. Appellant's rash was diagnosed as a contact dermatitis by Dr. Shiba, on May 3, 1987. Dr. Shiba offered no opinion as to the cause of the dermatitis. On May 8, 1987 Dr. Eswaran reported the condition as an "allergic rash," but offered no opinion as to its cause. On May 12, 1987 Dr. Eswaran reported appellant's condition as "poison oak," again without any statement which related the diagnosed condition to appellant's federal employment activities while on temporary assignment. Finally, appellant submitted a report dated August 20, 1987 from Dr. Eswaran which concluded that "I feel the patient was most likely infected with this rash while on assignment in the Reno area." Dr. Eswaran's opinion is not premised on a factual basis. Appellant originally claimed that the rash was the result of a spider or insect bite, but appellant herself did not even identify when this incident occurred. In a subsequent statement appellant noted that her symptoms appeared at night during her temporary assignment. Appellant has not met her burden of proof in establishing by the weight of the reliable, probative and substantial evidence that her rash condition which became manifest during her temporary assignment, was due to any incidental activities of her temporary assignment or any factors of her federal employment.

The decisions of the Office of Workers' Compensation Programs dated July 29, 1987 and November 13, 1987 are hereby affirmed.

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[7] 24 ECAB 215 (1973).

In the Matter of CHARLES H. POTTER *and* DEPARTMENT OF THE AIR FORCE, McGuire Air Force Base, N.J.

Docket No. 88-77; Submitted on the Record;
Issued March 23, 1988

Before GEORGE E. RIVERS, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether appellant has greater than a 15 percent monaural right ear hearing loss for which he received a schedule award.

On September 19, 1986 appellant, then a 57-year-old retired heavy equipment maintenance foreman, filed an occupational disease claim for hearing loss causally related to his exposure to noise in his federal employment. Appellant claimed to have experienced ringing in his ears for years, but that he only became aware of his hearing loss in August 1986 when he saw an audiologist. The employing establishment submitted appellant's personnel and medical records which indicated that appellant had been exposed to equipment noise levels of up to 106 decibels. Appellant started working at the employing establishment in November 1962 and retired on March 3, 1986.

In support of his claim appellant submitted copies of his employing establishment annual audiograms since 1978 and September 29 and 30, 1986 reports from Dr. Leonard M. Malamud, an osteopath, which noted appellant's complaints of tinnitus and that an August 30, 1986 audiogram performed for him showed bilateral high frequency sensorineural hearing loss. A Board-certified otolaryngologist, Dr. Joel D. Jaffe, who had examined appellant at Dr. Malamud's request, noted that a CAT scan was performed and that no organic pathologies were identified.

On January 12, 1987 an Office of Workers' Compensation Programs medical adviser who reviewed appellant's case record, medical reports, and audiograms, opined that appellant had noise-induced hearing loss, and based on appellant's June 19, 1987 audiogram calculated a 15 percent monaural loss in the right ear and a zero percent loss in the left ear.[1]

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[1] The August 30, 1986 audiometric evaluation performed for Dr. Malamud revealed the following results at 500, 1,000, 2,000 and 3,000 cycles per second: 10, 10, 35 and 75 decibels in the right ear and 10, 10, 20 and 30 decibels in the left ear.

By an April 14, 1987 compensation order the Office granted appellant a schedule award for a 15 percent monaural loss of hearing from August 30, 1986 through October 23, 1986 for 7.8 weeks of compensation.

By letter dated April 23, 1987 appellant requested reconsideration of his claim noting that the April 14, 1987 award did not mention left ear hearing loss or tinnitus and stating that Dr. Malamud's September 30, 1986 report noted hearing loss in both ears. In support of his request, appellant submitted evidence already part of the case record, a newspaper article and a rehabilitation institute newsletter on tinnitus, and a co-worker's statement about a 1985 muffler explosion near appellant.

The Office requested a second opinion and on June 19, 1987 appellant was examined by Dr. Allan Gold, an otolaryngologist.

In a July 17, 1987 report Dr. Gold noted a normal ear, nose, and throat examination of appellant; he stated that appellant's chief complaint was tinnitus which was greater on the right side. Dr. Gold evaluated the results of a June 19, 1987 audiogram [2] and noted as follows:

> "[Appellant's] audiogram showed mid to high-tone hearing loss in the right ear, and a more high-tone loss of hearing in the left ear. Aside from the 3,000 cycles per second area, there is no involvement of the speech frequencies.
>
> "I was able to compare our present test with one done in 1978. There has been approximately a 15 decibel worsening of his hearing in the involved frequencies over that nine-year period.
>
> "My impression is that as the result of his noise exposure, [appellant] has sustained noise-induced hearing loss, which has resulted in tinnitus. This symptom is not treatable, and is likely to be present throughout his life. The speech frequencies are relatively uninvolved, and [appellant] does not require a hearing aid at this time."

On August 18, 1987 an Office medical adviser reviewed appellant's case record, the June 19, 1987 audiogram and the new medical evidence and calculated a ten percent monaural loss of hearing in the right ear and a zero percent loss in the left ear.

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[2] The June 19, 1987 audiometric evaluation performed for Dr. Gold revealed the following at 500, 1,000, 2,000 and 3,000 cycles per second: 10, 10, 30 and 75 decibels in the right ear and 15, 10, 15, and 30 decibels in the left ear.

By compensation order dated September 28, 1987 the Office denied modification of the prior decision finding the evidence submitted insufficient to warrant modification of the prior decision.

The Board finds that appellant has no more than a 15 percent permanent monaural hearing loss in his right ear for which he received a schedule award.

The Office evaluates industrial hearing loss in accordance with the standards contained in the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (2nd ed. 1984) using the frequencies of 500, 1,000 2,000 and 3,000 cycles per second. The losses at each frequency are added up and averaged and the "fence" of 25 decibels is deducted since, as the *Guides* point out, losses below 25 decibels result in no impairment in the ability to hear everyday speech under everyday conditions. The remaining amount is multiplied by 1.5 to arrive at the percentage of monaural hearing loss. The binaural loss is determined by calculating the loss in each ear using the formula for monaural loss. The lesser loss is multiplied by 5, then added to the greater loss and the total is divided by 6 to arrive at the amount of the binaural hearing loss.[3] The Board has concurred in the Office's use of this standard for evaluating hearing losses for schedule award purposes.[4]

In the present case, the Office applied the standardized procedure to appellant's August 30, 1986 audiogram results as follows: the decibel losses for the right ear at 500, 1,000, 2,000 and 3,000 cycles per second which were 10, 10, 35 and 75 decibels were totalled incorrectly at 140 decibels and divided by four to obtain the average hearing loss at those cycles at 35 decibels. The average of 35 decibels was reduced by 25 decibels (the first 25 decibels were discounted as explained above) to equal 10 decibels which were multiplied by the established factor of 1.5 to compute a 15 percent loss of hearing for the right ear. Based on this calculation, appellant received a schedule award for a 15 percent monaural loss of hearing. If the decibel loss at 500, 1,000, 2,000 and 3,000 cycles per second had been correctly totalled at 130 decibels, then divided by four for an average four-frequency loss of 32.5 decibels, reduced by the 25 decibel "fence" to 7.5 decibels, then multiplied by the factor of 1.5, the result would have been an 11 percent monaural loss of hearing in the right ear. Appellant, therefore, received a schedule award larger than that to which he was entitled based upon Office mathematical error.

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[3] FECA Program Memorandum No. 272 (issued February 24, 1986).

[4] *Danniel C. Goings*, 37 ECAB 781 (1986).

Applying the same standardized procedure to appellant's June 19, 1987 audiogram results yields an average four-frequency loss in the right ear of 31.25 decibels less the 25 decibel "fence" times the factor of 1.5, resulting in a ten percent monaural loss of hearing in the right ear.

Because appellant's 1986 audiogram correctly revealed an 11 percent monaural loss of hearing and his 1987 audiogram revealed a ten percent monaural loss of hearing, there has been no increase in monaural hearing loss demonstrated to justify an increased schedule award.

On appeal appellant contends that he is entitled to compensation for bilateral loss of hearing, based on the August 30, 1986 audiogram performed for Dr. Malamud. Applying the standard quoted above to the decibel loss levels at 500, 1,000 2,000 and 3,000 cycles per second for the left ear, the four-frequency total is 70 decibels which, when divided by four equals an average decibel loss of 17.5 decibels from which the 25 decibel "fence" is subtracted leaving zero decibels to be multiplied by 1.5 for a zero percent compensable monaural loss of hearing. Applying the standard to appellant's June 19, 1987 audiogram results for the left ear provides identical results because the four-frequency decibel total is also 70; the average decibel loss 17.5, and the compensable monaural loss is zero.

Also on appeal appellant contends that he is entitled to compensation for tinnitus which he sustained as a result of exposure to hazardous noise during the course of his federal employment. However, the Board has repeatedly held that there is no basis for paying a schedule award for a condition such as tinnitus unless the medical evidence establishes that the condition caused or contributed to a ratable permanent loss of hearing.[5]

The A.M.A. *Guides* also allows for an award for tinnitus under disturbances of vestibular function.[6] However, no additional ratable permanent monaural hearing loss above the 15 percent for which appellant has already received a schedule award has been identified or documented, therefore, there is no medical evidence that tinnitus caused or contributed to a ratable hearing loss other than that for which compensation has already been recieved. Additionally, since no objective findings of dysequilibrium or evidence that appellant cannot perform his usual activities of daily living were presented, appellant has not made a case for an award for tinnitus which causes disturbances of vestibular function.

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[5] *Royce L. Chute*, 36 ECAB 202 (1984).

[6] *See* American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2nd ed. 1984) p. 158

Appellant would be entitled to compensation if it were established that his tinnitus resulted in a loss of wage-earning capacity.[7] However, there is no indication in the record that appellant sustained a loss of wage-earning capacity as a result of his tinnitus.

Since appellant has not demonstrated that his tinnitus caused or contributed to a ratable hearing loss other than that for which he has already been compensated, and since appellant has not established that his tinnitus has caused vestibular function disturbances or a loss of wage-earning capacity, there is no basis for paying appellant a schedule award for tinnitus.

The decisions of the Office of Workers' Compensation Programs dated April 14, 1987 and September 28, 1987 are hereby affirmed.

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[7] *John T. Bradley*, 25 ECAB 348 (1974).

In the Matter of RICHARD J. KENNY *and* DEPARTMENT OF THE NAVY, NAVAL RESEARCH & DEVELOPMENT CENTER, Annapolis, Md.

Docket No. 88-273; Submitted on the Record;
Issued March 25, 1988

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether appellant's claim for an emotional condition is barred by the applicable time limitation provisions of the Federal Employees' Compensation Act.

On January 28, 1987 appellant, then a 33-year-old electronics engineer, filed an occupational disease claim for stress and anxiety he experienced when he traveled on submarines.

Appellant first became aware of his emotional condition in February 1977; he first realized that it was caused or aggravated by his required travel on submarines in March 1978; he allegedly first reported his condition to his supervisor in February 1982; and he was last physically aboard a submerged submarine which he alleged exposed him to the conditions alleged to have caused his condition on September 7, 1982. Appellant did not stop work; he noted that after the September 1982 at-sea acoustical trial his travel for the next few years was to in-port submarines only, and he explained that he did not file a claim within 30 days of realizing that his condition was work-related because he did not seek medical treatment until

April 1985. Subsequently, appellant's work assignment was changed so that appellant would not have to travel on submarines on sea trials.

By letter dated February 18, 1987 the Office of Workers' Compensation Programs requested that appellant submit further factual and medical evidence in support of his claim.

On April 1, 1987 the Office received a copy of appellant's job description and employment history, a statement of the specific employment factors involved which noted that "being submerged on a submarine was the part of my job that I began to have trouble coping with," and a CA-20 attending physician's report dated March 3, 1987 from Dr. Barry L. Gruber, a psychologist, who diagnosed a "phobia reaction as a direct result of his employment experience with submarines." Dr. Gruber provided "desensitization" treatment in nine sessions from June 4 through September 10, 1985 and discharged appellant from treatment on October 15, 1985. No periods of total or partial disability were indicated.

By letter dated April 13, 1987 the Office advised appellant that further medical evidence including a medical narrative addressing causal relationship was required.

By letter dated July 13, 1987 the Office advised appellant of the provisions of 5 U.S.C. section 8122 which require written notice of occupational disease within three years of the last exposure to employment conditions responsible for appellant's claimed condition. The Office requested that appellant submit a statement from his immediate supervisor demonstrating that the supervisor had actual knowledge of appellant's employment-related condition within 30 days of his last exposure.

By report dated April 29, 1987 Dr. Gruber noted that he first saw appellant in May 1985 with a history of anxiety relative to riding on submarines beginning in 1977 which culminated in an extreme anxiety attack in September 1982 during a submarine sea trial when a false alarm emergency occurred. Dr. Gruber diagnosed "simple phobia" and "generalized anxiety" associated with trips on submarines and recommended desensitization; Dr. Gruber opined that appellant would eventually be able to return to sea duty with a few desensitization sessions just before trips. No further evidence was submitted.

By compensation order dated July 28, 1987 the Office rejected appellant's claim finding that appellant failed to timely file a notice of occupational disease.

By letter dated August 10, 1987 appellant requested reconsideration of the prior decision, and noted that he felt April 1985 should be considered his last date of exposure because "In early 1985 (April) I was assigned to a trip which would have included being at sea and submerged. Because of my problems I asked to be replaced." Also enclosed was an August 10, 1987 letter from appellant's supervisor which noted that appellant's last time on board a submarine at sea was in September 1982, that he had been scheduled for sea duty in April 1985, but that he had requested that he be replaced because he was "very uncomfortable with the idea of being on board a submarine at sea." At that time the supervisor suggested that appellant see a doctor about his condition.

By compensation order dated October 17, 1987 the Office denied modification of the prior decision finding the evidence submitted in support insufficient to warrant modification.

The Board finds that appellant's claim was timely filed within three years of the last incident that occurred at work which allegedly triggered his symptoms.

The evidence establishes that the last incident that occurred at work which allegedly triggered appellant's anxiety and phobic reaction was his assignment in April 1985 to a trip that would have included being at sea and submerged. It was this assignment incident that allegedly triggered his phobic symptoms causing appellant to ask to be replaced on the sea trial, and causing his supervisor to suggest medical treatment. Since the April 1985 assignment incident is the employment factor which he alleged triggered his most recent phobic reaction following appellant's September 1982 submerged submarine sea trials and since it occurred within three years of January 28, 1987, appellant has timely filed a claim for his emotional condition allegedly caused by factors of his federal employment.

The decision of the Office of Workers' Compensation Programs dated October 17, 1987 is hereby reversed and the case is remanded to the Office for a decision on the merits of appellant's claim.

In the Matter of OTILIO LEON *and* DEPARTMENT OF THE NAVY, NAVAL COMMUNICATIONS STATION, Ponce, Puerto Rico

Docket No. 88-292; Submitted on the Record;
Issued March 28, 1988

Before DAVID S. GERSON, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs hearing representative properly determined that appellant was not "without fault" in the creation of an overpayment of compensation in the amount of $6,145.71 and that therefore the overpayment was not subject to waiver; and (2) whether the Office hearing representative properly determined the amount of withholding from appellant's continuing compensation benefits.

On July 5, 1973 appellant, then a 59-year-old transportation equipment maintenance technician, filed a claim alleging injury to his low back on October 19, 1972 while raising an engine from the floor to a table. Appellant sought medical treatment that date from the employing establishment dispensary; he remained at work until May 18, 1983 when he took sick leave and was hospitalized for his back disability. On June 11, 1973 a myelogram revealed a herniated nucleus pulposus at L4-5 for which appellant underwent a laminectomy and discectomy at L5 on June 13, 1973. Appellant was discharged from the hospital on June 24, 1973; an employing establishment dispensary physician opined that appellant was totally disabled commencing May 18, 1973 for an undetermined period and recommended disability retirement. Appellant retired on disability on October 23, 1973.

On September 19, 1974 appellant was examined by Dr. Charles A. Payne, a Board-certified neurologist, upon referral by the Office of Workers' Compensation Programs for determination of the nature and extent of his bilateral leg involvement and disability as a result of the herniated nucleus pulposus at L4-5. Dr. Payne found that appellant's existing leg condition, including left foot drop and radiculopathy, was related to the employment injury and that appellant's disability remained total and permanent.

By letter decision dated May 5, 1975 the Office accepted appellant's claim for herniated nucleus pulposus and advised him that to qualify for compensation payments from the date of his disability retirement at ¾ of his former payrate, he had to submit proof that he supported his wife.

By letter dated March 25, 1976 the Office advised appellant that he would receive compensation at an augmented rate, based on the dependency of his wife, of $548.00 every 28 days from October 23, 1973.

In an Office CA-1049 form letter dated October 15, 1976 appellant was advised of the conditions under which he would continue to receive augmented compensation; he was informed that he must advise the Office immediately of any change in the status of any dependents.

In an Office CA-1032 form letter dated September 16, 1982 appellant was advised that he must identify his dependents or explain why he was no longer claiming additional compensation on account of dependents.

In a response dated September 21, 1982 appellant stated that he had divorced his wife on April 22, 1977 and had notified the U. S. Civil Service Commission of his change in status. He noted that after the divorce he had to obtain a live-in helper to care for him, and that he paid her $200.00 a month for attending him. Appellant also submitted a copy of his divorce decree dated April 4, 1977.

In an Office CA-1032 form letter dated April 7, 1985 appellant noted that he had no dependents and claimed no additional compensation because of dependents.

By letter dated May 3, 1985 an Office claims examiner advised appellant that the Office had preliminarily determined that there had been a $6,145.71 overpayment of compensation based on the fact that appellant was paid compensation at the augmented rate through December 1, 1982 but did not have a dependent after April 22, 1977, the date of his divorce. The Office further found that appellant was at fault in creating the overpayment for failure to advise the Office immediately of any change in his dependent's status in accordance with the Office CA-1049 form letter dated October 15, 1976. Appellant was advised to submit any relevant evidence or arguments if he disagreed with the fact or amount of overpayment or the finding of fault.

By letter received May 7, 1985 appellant disagreed with the fact and amount of overpayment and the finding of fault. Appellant asserted that he had notified the U. S. Civil Service Commission of his divorce and that no further information had been requested; he claimed the Office was at fault for failing to make the necessary adjustments, and that he would suffer financial hardships should the government collect the overpayment.

By letter decision dated May 19, 1986 the Office found that there was a $6,145.71 overpayment of compensation and that appellant was at fault in creating the overpayment for failure to advise the Office immediately of his April 22, 1977 divorce and consequent change in the status of his dependent. The Office sought recovery of the overpayment by requesting that appellant forward a check to the Office in the amount of $6,145.71 within 30 days.

In an Office overpayment recovery questionnaire dated May 26, 1986 appellant noted that he had no cash on hand, no checking or savings accounts, and no investments, assets or monthly income, but noted that he supported two daughters, ages 44 and 40 and a 21-year-old grandson paying $200.00 a month. Appellant listed other household and necessary monthly expenses as totaling $703.00. Appellant restated his belief that the Civil Service Commission would forward any relevant information to the Office, that the Office was at fault, and that he had not reported any overpayments because there was never a change in his monthly payments. By letter dated May 26, 1986 appellant requested a hearing on his claim.

In an OWCP-20 payment recovery questionnaire dated May 3, 1987 appellant noted $919.00 monthly income, $955.00 monthly expenses, $60.00 assets, and three student grandchildren whom he partially supported. Appellant restated that he never reported any change in circumstances because there never was a change in his checks.

A hearing was held on May 26, 1987 and by decision dated and finalized August 31, 1987 the Office hearing representative found that appellant had been notified by a CA-1049 form letter dated October 15, 1976, six months before his April 22, 1977 divorce, of his responsibility to advise the Office immediately of any change in the status of his claimed dependent, that since he did not it must be found that he withheld material information from the Office, and that such a finding of fault made waiver of the overpayment impossible. The Office hearing representative further found that since appellant's monthly expenses exceeded his monthly income, repayment of the overpayment must be figured on the basis of the minimum offset policy collection requirement which was 10 percent of appellant's present benefits or $92.00.

By letter dated September 15, 1987 appellant authorized the Office to deduct 10 percent per month from his monthly compensation benefits until the overpayment was fully repaid.

By letter dated November 16, 1987 the Office advised that $92.00 would be deducted every four weeks from his compensation.

On appeal, appellant contends that his memory was affected due to his disability, that notifying the Civil Service Commission in 1979 of his divorce showed his good intentions, and that he would experience severe financial hardship in attempting to repay his debt.

The Board finds that the Office properly determined that appellant was not without fault in the creation of an overpayment for the period April 22, 1977 through December 1, 1982, and that therefore the overpayment is not subject to waiver.

Section 8129 of the Federal Employees' Compensation Act provides that where an overpayment of compensation has been made because of an error of fact or law, the overpayment may not be waived. The only exception to this requirement is a situation which meets the following tests:

> "Adjustments or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience." [1]

In determining whether an individual is "without fault," what constitutes "fault" depends on whether the facts show the incorrect payment resulted from:

> "(a) An incorrect statement made by the payee which the payee knew or should have known to be incorrect; (b) Failure of the payee to furnish information which the payee knew or should have known to be material; or (c) Acceptance of payment which the payee either knew or should have been expected to know was incorrect." [2]

In the present case appellant was advised by Office form letter CA-1049 dated October 15, 1976, only six months before his divorce on April 22, 1977 that he was required to advise the Office immediately of any change in the status of any dependents. Although he was divorced on April 22, 1977 it was not until September 21, 1982 that the Office was notified. The claim by appellant that he immediately notified the Civil Service Commission of his divorce is evidenced only by a March 13, 1979 letter from the Office of Personnel Management which stated "[t]his is in response to your inquiry of

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[1] 5 U.S.C. section 8129(b).

[2] *See* Federal (FECA) Procedure Manual, Chapter 2-901. *See also Diane K. McColl*, 37 ECAB 574 (1986).

February 14, 1979 notifying us of your divorce." There is no indication that this February 14, 1979 letter, was or would be sent to the Office. The Board notes that informing another person or organization of such material information with the belief that the information will be conveyed to the Office will not fulfill appellant's obligation that he inform the Office directly of changes material to his receipt of compensation benefits.[3]

The Board finds that appellant failed to immediately advise the Office of his April 22, 1977 divorce and therefore failed to furnish information which he knew or should have known was material. The Office properly determined that he was without fault in creating the overpayment and that the overpayment is not subject to waiver.

The Board further finds that the Office hearing representative improperly determined the amount of withholding from appellant's future benefits necessary to repay the overpayment based upon Federal Employees' Compensation Act Bulletin No. 87-19 which states that in all overpayment cases the minimal acceptable offset against continuing benefits will be 10 percent of each scheduled payment.[4] The Board notes however, that the Office hearing representative failed to consider 20 C.F.R. section 10.321(a) in his decision; the section states in pertinent part:

> "Except for an overpayment resulting from forfeiture of previously paid compensation, such as provided in section 10.125, whenever, an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any resulting hardship upon such individual."

While appellant contends that he would experience severe financial hardship in attempting to repay his debt, the Office did not attempt to develop the evidence to determine the effect of the 10 percent withholding of monthly monetary compensation benefits on appellant. The Office did not consider the extent of appellant's financial expenses and obligations and the effect of such a withholding on those obligations. Federal Employees' Compensation Act Bulletin No. 87-19 does not allow the Office to ignore the provisions of 20 C.F.R. section 10.321(a) in insuring that recovery of an overpayment is made to minimize any resulting hardship upon the claimant.[5]

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[3] *See Carlos C. Trinidad*, Docket No. 85-1662 (issued September 30, 1985).

[4] *See* Federal Employees' Compensation Act Bulletin No. 87-19 (February 3, 1987), which notes as follows: "We recognize that the minimum offset established herein may result in some hardship on the debtor. However, the hardship results not from any failure to follow the requirement of 20 C.F.R. section 10.314 to minimize hardship, but rather from the need to comply with the competing requirement to promptly collect debts owed to the government. *See* Federal (FECA) Procedure Manual, Chapters 2-901 and 5-505."

On remand, the Office must further develop the case record to consider appellant's financial circumstances in accordance with 20 C.F.R. section 10.321(a).

The decision of the Office of Workers' Compensation Programs dated August 31, 1987 is hereby affirmed in all respects except for the determination under 20 C.F.R. section 10.321(a) of whether the $92.00 withholding will result in financial hardship upon appellant, for which the case is remanded to the Office for further proceedings consistent with this decision.

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[5] *Joyce Y. Wescott*, 39 ECAB 349 (1988).

In the Matter of WALTER ASBERRY, JR. *and* DEPARTMENT OF THE NAVY, BANGOR NAVAL SUBMARINE BASE, Bremerton, Wash.

Docket No. 86-1978; Issued March 30, 1988

ORDER GRANTING PETITION FOR RECONSIDERATION AND REAFFIRMING PRIOR DECISION OF THE BOARD AS MODIFIED

Before GEORGE E. RIVERS, DAVID S. GERSON, MICHELE VON KELSCH

The Board issued its decision and order in the above-entitled matter on January 16, 1987. The Board reversed the finding of the Office of Workers' Compensation Programs that appellant was at fault in an overpayment of compensation, finding that appellant's situation was covered by a quoted example from the Office's procedure manual. This example stated that in most situations when the original acceptance of a claim is rescinded and all compensation paid is declared an overpayment, the claimant would be found to be without fault "unless it could be proved that the claimant was aware that the acceptance of the claim was erroneous."

The Director of the Office filed a petition for reconsideration, contending that the example from the Office's procedure manual quoted by the Board "simply does not control the determination of fault under the circumstances of this case" and "does not mandate a finding that appellant was without fault in the creation of the overpayment," and that the Board's decision issued on January 16, 1987 was inconsistent with the Board's finding in its August 5, 1985 decision and order that the Office met its burden of proving that appellant did not sustain an injury in the performance of duty on September 13, 1982. The Director further contended that there was "a plethora of evidence in the case record demonstrating that appellant failed to furnish information which he knew or should have known to be material to the Office's determination whether he sustained an injury in the performance of duty on September 13, 1982," that "even though the Office had requested appellant to 'describe in detail the employment factors which you believe are responsible for your condition' appellant failed to inform the Office of significant facts (his receipt on September 13, 1982 of a notice of proposed removal, and the circumstances surrounding and leading up to the removal from his position effective October 28, 1982) which were clearly relevant to the Office's determination whether appellant sustained an injury in the performance of duty on September 13, 1982," and "the fact that appellant may have sincerely believed that he had been 'wronged' by the actions of the employing establishment and that he was indeed entitled to compensation under the FECA for this 'wrong' does not relieve him from providing relevant information necessary to the Office's determination of his case."

Appellant was served with a copy of the Director's petition for reconsideration, and replied that it was totally unwarranted.

The Board has carefully considered in the matter, and concludes that the petition should be granted so that the Director's contentions may be considered by the Board.

Section 8129(a) of the Federal Employees' Compensation Act[1] provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience." No waiver of overpayment is possible if the claimant is not without fault in helping to create the overpayment.

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[1] 5 U.S.C. section 8129.

In determining whether an individual is "without fault," what constitutes "fault" depends on whether the facts show, among other things, that the incorrect payment resulted from:

> "(a) An incorrect statement made by the payee which the payee knew or should have known to be incorrect; (b) Failure of the payee to furnish information which the payee knew or should have known to be material; or (c) Acceptance of a payment which the payee either knew or should have been expected to know was incorrect." [2]

Upon further consideration, the Board finds that the example the Board quoted from the Office's procedure manual covers only the third standard quoted above—acceptance of a payment which the payee knew or should have been expected to know was incorrect. The example states that in most situations when the original acceptance of a claim is rescinded and all compensation paid is declared an overpayment, as it was in the present case, the claimant would be found to be without fault unless it could be proved that the claimant was aware that the acceptance of the claim was erroneous. In the present case there is no indication that appellant was aware that the acceptance of the claim was erroneous. Appellant's communications with the Office and the Board make it clear that he believed and still believes that his claim is compensable under the Federal Employees' Compensation Act.

The Director's petition for reconsideration, however, contends that appellant should be found to be not "without fault" in the overpayment at issue under the second standard quoted above—failure of the payee to furnish information which the payee knew or should have known to be material.

After appellant filed his claim for an emotional condition which he attributed to his "false arrest" on September 13, 1982, the employing establishment, by a letter dated November 9, 1982, advised the Office that appellant was notified on September 13, 1982 of his proposed removal from his position, and that he was removed from his position on October 28, 1982. Given the fact that the Office knew of the September 13, 1982 notification of proposed removal at the time it accepted appellant's claim, it is anomalous for the Office to now maintain that appellant was at fault for not advising it of this notification.

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[2] Pursuant to *Califano v. Yamasaki*, 422 U.S. 682, 99 S. Ct. 2545, the Office established procedures to be followed in handling overpayment of compensation cases. These procedures are detailed in the Federal (FECA) Procedure Manual, Chapter 2-901, Overpayments.

The Board finds that the evidence in the case record does not establish that appellant failed to furnish information which he knew or should have known to be material. In a November 29, 1982 letter the Office requested that appellant describe in detail the employment factors which he believed were responsible for his condition, and provide medical opinion evidence of a cause and effect relationship based upon a proper factual and medical background. In response appellant submitted a statement dated December 13, 1982, in which he described the factors of his employment which he believed were responsible for his condition. With this statement he submitted seven attachments, three of which were medical reports on his condition and its relation to his employment. In a January 14, 1983 letter appellant further described factors of his employment to which he attributed his condition.

On February 2, 1983, having received no response to his submissions, appellant called the Office to inquire on the status of his case; he was told that a medical report on causal relation was needed. Appellant again called the Office on March 28, 1983 to inquire what additional evidence was needed; the Office advised him that it needed a reasoned medical report based upon a complete and accurate history. After appellant submitted two medical reports on his condition and its relation to his employment, the Office, by a May 17, 1983 letter, advised him of the type of medical evidence needed. In a June 7, 1983 letter the Office requested that he advise the Office if he wanted a formal decision to be issued based on the evidence already in the record, and that otherwise he should arrange for his psychiatrist to submit a report as requested in the Office's May 17, 1983 letter. On September 9, 1983 the Office referred appellant, the case record, and a statement of accepted facts to a Board-certified psychiatrist, and based on the report by this psychiatrist and review of the report by an Office medical adviser, accepted his claim.

The Board finds that the evidence does not establish that appellant knew or should have known that additional evidence on the circumstances of his removal was material. Given the series of communications between appellant and the Office described above, it was reasonable for appellant to believe that the only evidence needed by the Office after he submitted his December 13, 1982 and January 14, 1983 statements describing factors of his employment to which he attributed his condition was medical evidence, which he then attempted to supply. The Office cannot, after completing its development of the evidence and its adjudication of the claim, determine that certain evidence not specifically requested and not submitted years previously was material and that a claimant was at fault for not submitting such evidence, in the absence of a showing the claimant was advised of the specific evidence needed. The Office's general request for a description of employment factors to which appellant attributed his condition was not sufficient to put him on notice that the circumstances surrounding his removal were material, and these circumstances were disputed and not established until a decision by the Merit Systems Protection Board was issued after the Office accepted appellant's claim.

The Board sees no inconsistency between its finding on the present appeal that appellant was "without fault" and its finding in the August 5, 1985 decision and order [3] that the Office met its burden of proving that appellant did not sustain an injury in the performance of duty on September 13, 1982. The Board's finding in the August 5, 1985 decision and order that appellant's emotional upset due to his dismissal on the basis of willful misconduct must be considered self-generated was not dependent upon a finding that appellant failed to furnish information which he knew or should have known to be material. As pointed out above, the Office has not shown that appellant knew or should have known that the information he did not submit was material.

IT IS ORDERED that the petition for reconsideration be granted; the decision of the Board dated January 16, 1987 is hereby affirmed as modified herein.

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[3] 36 ECAB 686 (1985).

In the Matter of RICHARD A. PATTERSON *and* DEPARTMENT OF THE ARMY, RED RIVER ARMY DEPOT, Texarkana, Tex.

Docket No. 88-16; Submitted on the Record;
Issued March 30, 1988

Before MICHAEL J. WALSH, GEORGE E. RIVERS, DAVID S. GERSON

The issue is whether appellant has established that his skin condition is causally related to factors of his federal employment.

On August 14, 1986 appellant, then a 41-year-old industrial equipment mechanic, filed an occupational disease claim alleging that he developed facial redness and swelling, chest pain, and shortness of breath, due to hazardous chemical exposure in the course of his federal employment. Appellant first became aware of his condition in April 1986 and realized that it was causally related to his employment July 16, 1986 when an employing establishment clinic physician opined that his facial rash was due to something he worked with. Appellant did not stop work but was transferred to another work location away from his usual assignment in building 595 on July 17, 1986.

Appellant saw the employing establishment clinic physician, Dr. W. S. Tyson, Jr., on July 3, 1986 and by treatment record entry that date Dr. Tyson noted that appellant complained of a rash on his face and scalp which began approximately one month after appellant began work in building 595 as a millright. Dr. Tyson diagnosed photosensivity or lupus erythematosus. By treatment record entry dated July 16, 1986 Dr. Tyson noted that appellant's rash had cleared up while appellant had been on vacation and jury duty for one and one-half weeks, but that when he returned to work on July 14, 1986 the condition recurred. Examination on July 16, 1986 revealed a butterfly-type rash across appellant's nose. Dr. Tyson recommended that appellant be removed from building 595 that date to work in another location to see if the rash cleared up. By note dated July 21, 1986 an occupational health nurse noted that appellant's facial rash had almost resolved, and by note dated July 22, 1986 an occupational health nurse noted that appellant's facial rash was gone. By treatment note dated July 29, 1986 an occupational health nurse noted that appellant's face had turned a little red on July 25, 1986, and by note that date the clinic physician recommended appellant return to regular duty in building 595 on a trial basis. By treatment record entry dated August 1, 1986 Dr. Tyson noted that a butterfly rash had developed on appellant's face and recommended no further exposure(s) to solvents, fumes, chemicals or paints until appellant could see a dermatologist.

By report dated August 20, 1986 Dr. Paul K. McCash, a Board-certified dermatologist, noted that he had seen appellant on August 5, 1986 for complaints of a reddish, irritated dermatitis affecting the central portions of his face which appellant had noted for six to seven months and related to working in building 595 and to exposure to V.C.I. paper. Dr. McCash noted that the symptoms decreased when appellant was away from building 595 and noted that appellant had recently begun to experience weakness and a feeling that his "energy runs out"; he opined that Dermatomyositis (a collagen/connective tissue disease) might have to be considered.

On September 29, 1986 the Office of Workers' Compensation Programs received copies of appellant's job description, which included welding, pipefitting, machine assembly and repair, and motor vehicle operation, his employment history, and a diagram of his work area in building 595 which noted the proximity of the millright "shop" to chemical vats containing about 12 different chemicals including 1, 1, 1, trichloroethane (methyl chloroform-a degreaser). Other types of chemicals used in the building were noted to include an unnamed acid for removing corrosion, nine unnamed preservations, lead paint, a lacquer thinner, a dope thinner, a fingerprint remover, and Stoddard solvent.

Also received that date was a letter from appellant's supervisor, Mr. Bobby Stevens, dated September 23, 1986 which noted that on July 16, 1986 appellant informed him of his facial rash and was sent to the dispensary, that appellant had been thereafter removed from building 595 except for a one-week trial period during which appellant returned to building 595 and developed the rash again, and that he had no way of knowing if appellant's rash or other conditions were caused by chemicals. Mr. Stevens noted that the only sick leave appellant took was eight hours on September 22, 1986 to see a physician about his chest pain.

Appellant submitted an undated statement detailing a particular incident occurring three or four months earlier during which appellant had to change a temperature control valve on a tank that was leaking fumes. He noted that the fumes gave him a sore throat and made him short of breath. Appellant denied any history of skin problems or nonwork exposures to toxic chemicals and opined that the air conditioner in the millright shop sucked the fumes from the chemical vats into the work area. Appellant claimed that since his face broke out and swelled, he has experienced chest pain upon inhalation, easy fatigability, and severe headaches.

By letter dated October 14, 1986 the Office requested further detailed medical evidence and employment data including specifics on frequency and duration of chemical exposures, protective equipment used, and employer data and comments on the claimed exposures.

On November 12, 1986 the Office received an undated letter from appellant which noted that he continued to have breathing difficulty at times and continued to tire easily. Appellant noted that he was temporarily assigned to building 133 and that the swelling and redness in his face was not as bad.

By letter dated December 5, 1986 the Office advised appellant to submit medical evidence supporting a causal relationship with the alleged employment factors. Nothing further was received.

By compensation order dated January 23, 1987 the Office rejected appellant's claim finding that the he had failed to meet his burden of proof in establishing a causal relationship.

On February 24, 1987 the Office received a letter from appellant which noted that "there is no doubt that the chemical 1, 1, 1, Trichloroethane that leaked on me caused my face to turn red with swelling and burning. I sat there on the floor 15 minutes before [a coworker] could go and get another thermostat. I inhaled quite a bit of the chemical." Appellant noted that Dr. James H. Herndon, Jr., a Board-certified dermatologist, had told him that his immunity had been broken down by the chemical and that he would now be allergic to many things.

By letter dated March 11, 1987 appellant requested reconsideration and submitted in support a statement which noted as follows:

> "In April 1986 I was working in buildings 594 and 595. We had a work order to change or fix a thermostat on a tank containing the chemical trichloroethane. The tank was located in building 595 zone 4. [A coworker] and I went out to work on the tank. I sat down on the floor on the east end of the tank with my legs underneath the tank, then I removed the thermostat from the tank. Some liquids and fumes started escaping, then I tried to put a new thermostat in. It was the wrong thermostat for that tank, it wouldn't fit in the hole. At this time the liquid and fumes were still running out on me and the floor. My head was about 12 inches from the hole. I put my hand over the hole to try to keep the liquid and fumes from

> coming out. . . . I sat there about 15 minutes . . . with my hand over the hole. [My coworker] returned with the thermostat. At this time quite a bit of liquid had leaked out on me. It took us approximately 30 minutes before we finished the job and stopped the leaking. . . . I felt like there w[ere] bugs crawling on my face, I went and washed my face and hands. That night I had a mild headache. The next day my face started turning red around my eyes, nose and mouth. It felt like something was again crawling on my face. . . . I was short of breath. I was hurting in my lungs and chest. . . . I returned to work after that back in building 595. I worked about four days when I started breaking out and having chest pains and dizzy spells. . . . I was not aware of the danger of this chemical since I had no training or information on this chemical."

On March 16, 1987 the Office received a report dated January 8, 1987 from Dr. Herndon which noted that a copy of the label from the 1, 1, 1, Trichloroethane had been received and that "My diagnosis for your case was seborrheic dermatitis, possibly triggered by a sensitivity reaction to 1, 1, 1, Trichloroethane."

By compensation order dated April 17, 1987 the Office denied modification of the prior order finding the evidence submitted insufficient to warrant modification of the prior decision.

By letter dated May 5, 1987 appellant requested reconsideration of his claim. In support he submitted another statement which noted as follows:

> "When I was first exposed to the chemicals my face started breaking out. It would come and go. Sometimes it would go away for a week or so. I kept thinking it would go away . . . . Dr. Tyson . . . said he wanted to remove me from the chemicals to see how my face would do. I was away for about a month. My face almost completely cleared up. After returning to 595 it broke out again. This time with some swelling in my face and hurting in my left chest. . . . I was returned to 595 twice. The last time I returned was April 24, 1987. I was sent to the dispensary by my supervisor on April 24, 1987 due to breaking out on my face in just one day of working in 595."

Appellant also submitted an April 28, 1987 letter from Dr. Herndon which noted as follows:

> "After examining and testing [appellant] I have diagnosed Trichloroethane-induced skin disease (facial dermatitis). The

best copy available

> time-relationships between his reexposure to the material and the development of the eruption seems conclusive. Since a chemical in his work environment is responsible for an intolerable physical disability, he should be transferred to a job within the organization that allows freedom from contact with 1, 1, 1, Trichloroethane."

By compensation order dated June 24, 1987 the Office denied modification of the prior decision finding that the evidence submitted was insufficient to warrant modification of the prior decision.

The Board finds that the case is not in posture for decision.

The evidence of record establishes that on a specific day in April 1986 appellant was given a work order to a change a thermostat on a tank of Trichloroethane in building 595, that he attempted to do so, and that in doing so he found that the replacement thermostat he had brought along was not the correct size for the job. Appellant removed the existing thermostat to replace it and, because the replacement was not the right size, his coworker had to find the correct size while appellant sat next to the tank with his hand over the opening trying to stop the flow of liquid and fumes for 15 minutes. Appellant sustained a significant skin and inhalation exposure to the chemical 1, 1, 1, Trichloroethane during that time and during the subsequent refitting of the correct thermostat and he immediately experienced dermatologic symptoms from the exposure. Later these symptoms developed into a red facial rash and chest pain which lasted until after appellant was removed from the work area. Each time he was returned to the work area he developed the symptoms in progressively shorter lengths of time until being in building 595 for only one day was sufficient to trigger his facial rash and chest pain.

Although appellant was not able to document the actual date of his toxic exposure the date should be easily ascertainable from the employing establishment's record copy of the specific April 1986 work order for appellant to change the thermostat on the tank of 1, 1, 1, Trichloroethane in building 595.

Appellant was initially treated in early July 1986 for dermatitis of the face and chest pain by Dr. Tyson at the employing establishment clinic, who recommended that appellant be removed from working around all chemicals. Clinic records document that while appellant was away from building 595 his symptoms lessened but that when reexposed to the chemicals in building 595 he redeveloped the symptomatology with increasing speed.

Appellant was evaluated by Dr. Herndon, a Board-certified dermatologist, who opined initially on January 5, 1987, after receiving a label from the Trichloroethane, that appellant had seborrheic dermatitis possibly triggered by a sensitivity reaction to 1, 1, 1, Trichloroethane. Dr. Herndon subsequently opined that, after examining and testing appellant, he had Trichloroethane-induced skin disease. Dr. Herndon felt that the time relationships betwen appellant's reexposure to 1, 1, 1, Trichloroethane and his development of the facial eruptions seemed conclusive.

While the reports submitted by appellant are not sufficient to establish that his facial dermatitis and related symptomatoloy which became pronounced on July 16, 1986 is causally related to the specific April 1986 toxic exposure, they are sufficiently probative to require further development of the record.[1] Additionally, the Board has stated that while it is the burden of an employee to establish his or her claim the Office also has a responsibility in the development of factual evidence, particularly, when such evidence is of the character normally obtained from the employing establishment or other government source.[2] On remand, the Office should obtain from the employing establishment the results of any past occupational health monitoring examinations performed on appellant, past and present listings of all of the chemicals in building 595 during the time period in question and the industrial hygiene air monitoring survey results for airborne concentrations of these chemicals in spot sample concentrations and in time-weighted averages for set periods of exposure, a listing of respiratory protection equipment available for personnel use, and any incident reports that may have been executed regarding appellant's April 1986 exposure. The employing establishment should also be requested to comment on appellant's allegations regarding his exposure and reexposures.[3]

The Office should contact Drs. McCash and Herndon and obtain medical records relating to treatment of appellant; it should then assemble a statement of accepted facts noting the date, time, and nature of appellant's initial exposure to 1, 1, 1, Trichloroethane and his subsequent reexposure to the chemical and to airborne concentrations of the chemical with rate of development of symptomatology, and refer appellant to a Board-certified specialist for a rationalized medical opinion on the causal relationship between appellant's initial exposure and sensitization, his reexposure and development of his subsequent symptomatology, and contact with the chemicals in question.

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[1] *See Horace Langhorne*, 29 ECAB 820 (1978).

[2] *See Russell Martin Dawson*, 32 ECAB 1998 (1981).

[3] *See Jack A. Shoffner*, 32 ECAB 1555 (1981).

After such further development as the Office deems necessary, a *de novo* decision should be issued.

The decisions of the Office of Workers' Compensation Programs dated January 23, April 17 and June 24, 1987 are hereby set aside and the case is remanded to the Office for further development and a *de novo* decision in accordance with this decision.

In the Matter of RICHARD T. DEVITO *and* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Jamaica, N.Y.

Docket No. 86-2144; Hearing July 16, 1987;
Issued March 31, 1988

Appearances: *Richard T. DeVito, pro se; Sheldon G. Turley, Jr., Esq.,* for the Director, Office of Workers' Compensation Programs.

Before GEORGE E. RIVERS, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issues are: (1) whether appellant had any disability after May 17, 1982 due to an employment-related temporary aggravation of a preexisting allergic rhinitis condition; (2) whether the Office of Workers' Compensation Programs properly determined that appellant was not entitled to vocational rehabilitation benefits; (3) whether the Office properly computed appellant's rate of pay under section 8114(d)(1) of the Federal Employees' Compensation Act; and (4) whether the Office properly found that appellant was not "without fault" with respect to the creation of an overpayment in the amount of $5,949.30.

This is the fourth appeal in this case to the Board. The Board's decision and order of August 27, 1981 set forth the relevant facts and circumstances of the case and is hereby incorporated by reference.[1] In that prior decision the Board found that the Office of Workers' Compensation Programs had properly determined appellant's rate of pay for compensation purposes and had properly terminated his compensation for aggravation of a chronic hepatitis condition as the weight of medical opinion evidence established that the condition was temporary and ceased after appellant's exposure to jet fumes ceased. The Board noted, however, that the Office had originally accepted appellant's claim for aggravation of allergic rhinitis and remanded the case to the Office for further development and determination as to whether the condition remained aggravated by the factors of appellant's federal employment.

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[1] 32 ECAB 1868 (1981).

On remand, the Office prepared a statement of accepted facts and referred it, together with appellant and the case record, to Dr. Irwin Lipp, a Board-certified otolaryngologist, for examination an opinion on whether the job-related aggravation of appellant's allergic rhinitis had ceased, and if not, the nature and extent of appellant's disability. In a report dated April 28, 1982 Dr. Lipp stated:

> "Appellant was seen by me on April 12, 1982. During the examination patient claimed that exposure to fumes during his employment caused nasal-throat discomfort and allergic symptoms. Since being away from his job these symptoms have improved over the past few years. This would certainly seem reasonable since exposure to poor air quality would account for the patient's previous symptoms but with removal from the latter environment, the condition generally will subside. This is the rationale for changing the environment for allergic individuals.
>
> "His examination was essentially unremarkable. I therefore believe that while symptoms described above may have been job-related at the time, there are no sequellae and no disability now."

On May 17, 1982 an Office medical adviser reviewed the case record and stated that the report of Dr. Lipp established that the employment-related aggravation of appellant's preexisting allergic rhinitis had ceased.

By compensation order dated September 18, 1984 the Office rejected appellant's claim for compensation after August 13, 1980 finding that the weight of medical opinion established that the employment-related aggravation of his preexisting allergic rhinitis had ceased.

By memorandum dated July 24, 1985 the Office reopened appellant's claim noting that appellant contended that his pay rate should have been that of a GS-14, as air traffic controllers had been upgraded; that appellant alleged a loss of wage-earning capacity in that he was barred by the employing establishment from pursuing his profession; that appellant alleged his premium pay was incorrectly determined; and that his health benefits had not been transferred to the Office of Personnel Management. The Office noted that appellant was entitled to compensation through May 17, 1982 and that a formal decision would be issued on appellant's claim after development of the evidence.

By memorandum dated September 3, 1985 the Office noted that appellant was in a learner's capacity as an air traffic controller at the time of injury which prevented him from getting a GS-13. The Office reviewed appellant's salary history, noted that appellant was appointed on February 2, 1970 as a 9/1, that he was promoted to an 11/1 effective February 7, 1971 and that he would have been promoted to a 12/1 effective February 7, 1972 and a 13/1 effective February 7, 1973. The premium pay for the year prior to the October 26, 1971 disability was taken as a fraction of the base pay and yielded a fraction of eight percent which was used to adjust appellant's pay.

The Office also obtained appellant's earning statements from Trans World Airline for the period August 13, 1980 to May 17, 1982. Appellant noted that he first began work with TWA as a part-time reservation agent on February 23, 1981. On September 4, 1985 appellant was advised that in determining his loss of wage-earning capacity from March 1, 1981 to May 17, 1982 the average earnings he received while employed with TWA were deducted against his compensation entitlement. Appellant was provided with an election form for the period August 13, 1980 to May 17, 1982.

By letter dated September 5, 1985 the Office advised appellant that he should contact the Office of Personnel Management with regard to his health benefit deductions as the Office did not have jurisdiction over the issue under the Act; that under the Act compensation may be increased to reflect a learner's capacity but once that level was reached, no further adjustments would be made except for cost of living and that compensation rates were not adjusted to reflect an upgrading of a position when the injured employee has not worked at the position in the higher level; that appellant's pay rates were increased by eight percent to reflect his probable premium pay earnings; and that May 17, 1982 was the date that the Office had met its burden in determining that appellant no longer had an employment-related disability. Appellant was requested to review the letter to determine whether any other issues remained to be addressed and was informed that a compensation order would be issued with respect to his claim.

On September 18, 1985 appellant notified the Office that he elected OWCP compensation for the period of August 14, 1980 through May 17, 1982. In a letter received that same date, appellant requested vocational rehabilitation benefits as he was medically disqualified from performing his former duties; noted that a finding by the Federal Aviation Administration that appellant was medically disqualified from his former position was binding on the Office for purposes of compensation benefits; stated that he was a GS-12 Step 5 at the time that compensation benefit payments were started and that he would have achieved a GS-14 grade level and that any loss of wage-earning capacity should be based on the higher grade; and requested that his pay rate be adjusted for cost of living before adding the eight percent premium pay adjustment.

By compensation order dated October 23, 1985 the Office determined the following: (1) that the weight of medical opinion established that disability related to federal employment had ceased by May 17, 1982; (2) that premium pay for periods after February 7, 1971 had been established at eight percent of the base pay rate; (3) that appellant was not entitled to compensation at the GS-14 level as he had not worked in the position prior to the upgrade; (4) that health benefit deductions would be made from compensation payable for the period August 14, 1980 to May 17, 1982; (5) that compensation benefits were not payable for any period after May 17, 1982 as employment-related disability had ceased; (6) that payment of OWCP benefits was subject to a full offset of benefits received by appellant from the Office of Personnel Management; (7) and that the right to vocational rehabilitation benefits ceased once it was established that the employment-related disability had ceased on May 17, 1982.

Appellant requested reconsideration and submitted the December 16, 1985 report of Dr. Richard H. Nachtigall, a Board-certified internist, who stated that he had recommended that appellant be removed from his position as an air traffic controller in May, 1973 due to appellant's increased fatigue and a rise in appellant's transaminase upon his return to work. He indicated that appellant's exacerbation of hepatitis was due to the improperly ventilated area in which appellant had worked.

By compensation order dated February 3, 1986 the Office denied modification of the October 23, 1985 decision, after a review on the merits, finding that the medical evidence presented was essentially the same as previously considered and that other points raised by appellant had been evaluated and no substantial new issue had been raised on reconsideration.

By memorandum dated February 20, 1986 the supervisory claims examiner noted that he had authorized an incorrect payment of compensation to appellant. The claims examiner noted on February 19, 1986:

> "Compensation was paid at TTD [temporary total disability] rather than LWEC [Loss of Wage-Earning Capacity].
>
> "At 11:00 a.m. on February 19, 1986, I called . . . for the claimant's phone number. . . .
>
> "The claimant called the Office at 4:30 p.m. He stated that he did not receive the check. I then told him of the overpayment. I asked that he return the check as soon as it is received and that once cancelled, a new check for the correct amount would be authorized as soon as possible. He expressed displeasure at the system and I stated that he had administrative recourse. . . ."

* * *

> "February 28, 1986—Called Mr. DeVito. He advised that he received the check and deposited it. I stated that a letter of overpayment would be issued the next business day."

On March 3, 1986 the Office made a preliminary determination that there had been an overpayment of compensation in the case in the amount of $5,949.30. The overpayment was created as compensation for the period August 14, 1980 to May 17, 1982 was paid at total disability instead of reflecting appellant's actual earnings for the period. The Office made a preliminary determination that appellant was at fault in the creation of the overpayment as he was advised of the error prior to receipt of the compensation check and that he was aware he had been overpaid.

On February 26, 1986 appellant filed an application for review of the Office's October 23, 1985 decision. On April 4, 1986 the Director filed a motion to remand the case record as the case file did not contain a copy of the decision for review by the Board and that, on remand, the Office would reissue a decision in order to protect appellant's appeal rights.

By order dated June 2, 1986 the Board granted the Director's motion to remand the case for reconstruction of the case record and a *de novo* decision on appellant's claim.

On remand, the Office reassembled appellant's case record and issued a decision on August 1, 1986 which set forth the findings made in the October 23, 1985 decision as set forth above.

On August 18, 1986 the Office issued a final decision finding that appellant was at fault in the creation of an overpayment in the amount of $5,949.30.

On September 12, 1986 appellant filed an application for review of both decisions of the Office.

The Board finds that the weight of medical opinion evidence establishes that appellant had no disability on or after May 17, 1982 due to an employment-related aggravation of his allergic rhinitis condition.

In the prior appeal before the Board, the case record was remanded to the Office for further development as to whether appellant's allergic rhinitis condition remained aggravated by the factors of his federal employment. Appellant was referred, together with the case record and a statement of accepted facts, to Dr. Lipp, a Board-certified otolaryngologist, who provided an April 28, 1982 report in which he stated that his examination of appellant on April 12, 1982 was unremarkable. Dr. Lipp noted that appellant's employment exposure to jet fumes had caused a temporary aggravation of appellant's allergic rhinitis symptoms which ceased after appellant was removed from the employing establishment environment. He concluded that appellant had no "sequellae and no disability" as of the date of his examination related to his occupational exposure. On May 17, 1982 an Office medical adviser reviewed Dr. Lipp's report and concurred with his stated conclusion.

Where employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for periods of disability related to the aggravation. However, where the aggravation is temporary, as in the present case, and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased. This is true even though the employee is found medically disqualified to continue in such employment because of the effect which the employment factors might have on the underlying condition. Under such circumstances, his disqualification for continued employment is due to the underlying condition, without any contribution by the employment.[2] Appellant, therefore, is entitled to compensation only for the period of temporary aggravation of his underlying allergic rhinitis attributable to his federal employment. Dr. Lipp's medical report established that appellant's employment-related aggravation had ceased and the Office properly determined that appellant was not entitled to further compensation benefits after May 17, 1982. The Office met its burden of proof in establishing that appellant's disability is no longer related to his federal employment.[3]

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[2] *Eugene Diachun*, 36 ECAB 360 (1984).

The Board finds that the Office's denial of appellant's application for vocational rehabilitation was reasonable under the circumstances of the case.

Section 8104 of the Federal Employees' Compensation Act, which provides for vocational rehabilitation, vests the Office with discretionary powers.[4] The Office's decision involving the exercise of this discretion will not be disturbed by the Board unless it is clearly in error.[5]

To be eligible for rehabilitation benefits, there must be a showing that there has been an impairment in an employee's wage-earning capacity.[6] The purpose of providing training under the Act is to upgrade the skills or education of beneficiaries who cannot return to their former federal employment, in order that they may qualify for other suitable employment and restore lost earning capacity.[7]

In the prior appeal, the Board found that the medical evidence of record established that the aggravation of appellant's chronic hepatitis condition caused by his exposure to jet fumes in his federal employment was a temporary condition which had ceased by August 6, 1980, the date appellant was examined by Dr. Fenton Shaffner, a Board-certified gastroenterologist. In the present case, the medical evidence of record establishes that the aggravation of appellant's allergic rhinitis condition due to his occupational jet fume exposure was temporary in nature and had ceased by April 12, 1982, the date he was examined by Dr. Lipp. Since the medical evidence of record indicates that appellant's employment-related disability had ceased by May 17, 1982, he is not eligible for rehabilitation benefits under the Act.

The term "disability" as used in the Act means the incapacity because of injury in employment to earn the wages which the employee was receiving at the time of injury.[8] The general test for determining loss of wage-earning capacity is whether injury-related impairment prevents the employee from performing the kind of work he was doing when injured.[9] The record in the instant appeal indicates that exposure to jet fumes caused only a temporary aggravation of appellant's chronic hepatitis and allergic rhinitis conditions which have ceased. There is no evidence that appellant sustained any permanent physical impairment or has any employment-related loss of wage-earning capacity. For this reason, the Office properly determined that appellant was not entitled to vocational rehabilitation benefits under section 8104.

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[3] *John Wilkes, Jr.*, 36 ECAB 451 (1985).

[4] 5 U.S.C. section 8104.

[5] *See Mary A. Brown*, 27 ECAB 389 (1976).

[6] *Hix Nathan Wommack, Jr.*, 31 ECAB 795 (1980); *Joseph Reuter*, 11 ECAB 296 (1960)

[7] *Gary S. Loser*, 38 ECAB 673 (1987); *Willie S. Bolden*, 33 ECAB 316 (1981).

[8] *Edward E. Hilker*, 31 ECAB 499 (1980); *Elden H. Tietze*, 2 ECAB 38 (1948).

[9] *Margaret E. Grigsby*, 27 ECAB 138 (1975); *Evelyn J. Gray*, 6 ECAB 88 (1953).

The Board also finds that the Office properly computed appellant's rate of pay.

Section 8114(d) of the Act provides for the average annual earnings of an employee to be determined, as follows:

> "(1) If the employee worked in the employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay—
>
> > (A) was fixed, the average annual earnings are the annual rate of pay; or
> >
> > (B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for the particular employment, or the average thereof if the daily wage has fluctuated, by 300 if he was employed on the basis of a 6-day work week, 280 if employed on the basis of a 5 and one-half day week, and 260 if employed on the basis of a 5 day week." [10]

Appellant's premium pay (the total of night differential, Sunday and holiday pay) was established by the Office at eight percent of his base pay rate for his actual earnings after October 26, 1971. In determining appellant's premium pay, it was not possible for the Office to determine what a similar employee earned during the periods prior to recurrence or scheduled promotions. For this reason, the first pay rate of record was analyzed and the Office determined that for the year prior to October 26, 1971 appellant earned a premium equal to eight percent of his base salary. Appellant occupied his position for more than one year prior to October 26, 1971 and for that year his premium pay amounted to eight percent. This figure was therefore used by the Office to determine appellant's subsequent entitlement to premium pay. This method of calculation is in conformance with the Office's established procedures in determining the amount of premium pay.[11]

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[10] 5 U.S.C. section 8114(d).

[11] Federal (FECA) Procedure Manual, Chapter 2-900(9)(2)(h).

On appeal, appellant also contends that his entitlement to compensation should have been based on the pay rate of a GS-14. The Board notes that this contention was raised by appellant in the prior appeal before the Board and was ruled upon at that time. Appellant has not submitted any new evidence on this issue. For this reason the Board's prior finding on this issue is controlling and will not be set aside.[12]

The Board finds further that appellant was not "without fault" with respect to the creation of an overpayment of compensation in the amount of $5,949.30 and, therefore, the overpayment is not subject to waiver.

Section 8129(b) of the Act provides that where an overpayment of compensation has been made because of an error of fact or law, adjustment or recovery shall be made. The only exception to this requirement is a situation which meets the test set forth as follows:

> "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment would defeat the purpose of this subchapter or would be against equity and good conscience." [13]

In order to qualify for waiver, the recipient of any overpayment of compensation must be without fault. If he is not, there is no basis for waiving the overpayment.[14]

In determining whether an individual is "without fault", what constitutes fault depends on whether the facts show the incorrect payment resulted from:

> "(a) An incorrect statement made by the payee which the payee knew or should have known to be incorrect; (b) Failure of the payee to furnish information which the payee knew or should have known to be material; or (c) Acceptance of a payment which the payee knew or should have been expected to know was incorrect." [15]

In the present case it is apparent that the Office applied the third standard to appellant—acceptance of a payment which appellant either knew or should have known was incorrect. The record establishes that the overpayment was created in this case following an election by appellant to receive compensation benefits for the period of August 14, 1980 to May 17, 1982 in lieu of his civil service annuity. Compensation was paid to appellant on the basis of total disability for the entire period instead of total disability through March 1, 1981 and compensation reflecting his actual earnings through May 17, 1982. When the error in computation was discovered, it was brought to appellant's attention on February 19, 1986 prior to receipt of the check when he was requested to return the check issued by the Office. Upon receipt of the check appellant, however, accepted the check and deposited the monies to his account despite the specific request of the Office that the check be returned. The evidence clearly establishes that appellant accepted a payment which he knew or should have known to be incorrect.

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[12] *See Hugo A. Mentink*, 9 ECAB 628 (1958).

[13] 5 U.S.C. section 8129(b).

[14] *See William W. Rodgers*, 30 ECAB 809 (1979).

[15] Pursuant to *Califano v. Yamasaki*, 422 U.S. 682, 99 S. Ct. 2542, the Office established procedures to be followed in handling overpayment of compensation cases. These procedures are detailed in the Federal (FECA) Procedure Manual, Chapter 2-901, Overpayments, Part 2-claims.

The Office properly determined that appellant was not without fault by failing to return the check he received for compensation due for the period August 14, 1980 to May 17, 1982. Since appellant was not "without fault" there is no basis for waiving the overpayment.

On appeal, appellant contends that he is entitled to interest on his compensation benefits for the period August 14, 1980 to May 17, 1982.

The terms of the Act are specific as to the method and amount of payment of compensation; neither the Office nor the Board has the authority to enlarge the terms of the Act nor to make an award of benefits under any terms other than those specified in the statute. Unless appellant's contentions are in keeping with the scope or intent of the Act, *i.e.*, unless the statute authorizes payment of the kind demanded by appellant, the Office's denial of such demands must be affirmed.[16]

There is no provision in the Act for payment of interest on awards of compensation. The Act contains no provision which either in specific terms or by way of implication would authorize the payment of interest when awards of compensation are made retroactively. Although interest is payable under a few state worker's compensation statutes, in these situations the statutes usually specifically provide for interest. Further, the state worker's compensation laws primarily relate to actions between private employers and their employees, while the Act deals with payments by the sovereign to its employees. Since the Act does not provide for payment of interest, the Office properly denied appellant's claim for interest on his retroactive award.[17]

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[16] *Helen A. Pryor*, 32 ECAB 1313 (1981).

On appeal appellant has also raised an issue relating to deductions made for his health benefit plan and reimbursement to the Office of Personnel Management for benefits received from OPM for the period August 14, 1980 through May 17, 1982. However, as the jurisdiction of the Board is limited to final decisions of the Office arising under the Federal Employees' Compensation Act, the Board does not have jurisdiction to review decisions relating to the Federal Employees' Health Benefit Program which is under the regulatory authority of the Office of Personnel Management.[18]

The August 1, 1986 and August 18, 1986 decisions of the Office of Workers' Compensation Programs are affirmed.

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[17] *Delores Jean Quick*, Docket No. 87-850 (issued August 14, 1987); *Abraham Hoffenberg*, 17 ECAB 527 (1966).

[18] *See Thomas Y. Dempsey*, 25 ECAB 267 (1974).

In the Matter of JAMES JONES, JR. *and* DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, Wash.

Docket No. 87-1681; Submitted on the Record;
Issued March 31, 1988

Before GEORGE E. RIVERS, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant had received a $10,635.81 overpayment in compensation.

On April 18, 1975 appellant, then a 52-year-old motor vehicle operator, developed low back pain after he slipped off the side of a garbage semi-trailer, landing on his feet. He stopped working on April 25, 1975 for four hours and then stopped work again beginning April 29, 1975. The Office of Workers' Compensation Programs accepted appellant's claim for lumbosacral strain and began payment of temporary total disability compensation effective June 19, 1975, the day appellant was placed on leave without pay.

Among the material submitted by the employing establishment to the Office was a May 31, 1975 note from appellant in which he identified himself as the district manager for the Well Done Service Company.

In a memorandum of an April 27, 1976 telephone conversation an official with the Office reported that appellant estimated that he earned approximately $2,000.00 during the period June 19, 1975 through March 31, 1976. In a May 10, 1976 claim for continuing compensation for the period April 11, 1976 to May 11, 1976, appellant indicated that he worked part-time, three to four hours a day, as a district manager for Well Done Service Company. He reported that he earned approximately $400.00 during the period.

In a June 22, 1976 letter the general manager of the Well Done Service Company informed the Office that appellant had worked as a supervisor for the company from January 1974 to the current period. The manager indicated that appellant worked 80 hours a month and earned the following rates of pay: $4.10 an hour beginning January, 1974; $4.25 an hour beginning August, 1974; $900 a month beginning May 1975; $1,050 a month beginning July 1975; $1,200 a month beginning December 1975; and $1,300 a month beginning April 30, 1976.

In an undated claim for continuing compensation for the period July 1, 1976 to September 22, 1976, appellant reported that he worked part-time on each work day during the period. He stated that he earned $1,300 a month for a total gross earnings of $3,900. In an October 10, 1976 claim for the period beginning September 22, 1976, appellant indicated that he worked four to six hours a day and earned $1,000 a month in take home pay.

In a November 8, 1976 letter, the Office informed appellant that he would be paid temporary total disability compensation automatically every four weeks. In a January 19, 1977 letter, the Office stated that the medical evidence showed that appellant was no longer totally disabled for work. The Office indicated that it would proceed with a determination of appellant's loss of wage-earning capacity.

In a January 27, 1977 letter, appellant stated that he was working for Well Done Service Company at the time of the injury. He indicated that he was able to work only four to five hours a day.

In a March 15, 1977 report Dr. G. Paul Bromwell stated that appellant had been treated for degenerative disc disease since April 1975 when he was injured at work. He commented that appellant could not resume the same type of work he performed previously because of his disability. He indicated that appellant could possibly work approximately three to four hours a day in a job not requiring lifting or bending.

In an April 27, 1978 CA-1032 form, appellant reported that he worked for Control Janitorial Company as a part-time supervisor and assistant manager from January 10, 1977 to April 30, 1978, earning $200.00 a week. In a July 7, 1978 letter, a manager with Control Janitorial Co. indicated that appellant had been working with the company as an assistant manager five and a half to six hours a day since October 1, 1977. He reported that appellant earned $800.00 a month. He commented that appellant might not be able to work much longer due to his back problems.

In a June 8, 1979 letter appellant informed the Office that in the prior year he had worked in several jobs. He reported that he worked from April 1, 1978 to January 1, 1979 for Control Janitorial Co. as an assistant manager earning $800.00 a month; from January 1, 1979 to April 30, 1979 for Well Done Service Co. as an assistant production manager earning $1,100.00 a month; from April 30, 1979 to May 15, 1979 for Control Janitorial Co. as an assistant manager earning $800.00 a month and after May 15, 1979 for Handyman Building Maintenance Co. earning $1,200 a month.

The Office determined that appellant could perform the duties of a manager of a service establishment which required the ability to lift up to 10 pounds.[1] The Office calculated that appellant had a 22 percent loss of wage-earning based on his actual earnings of $1,200 a month from his most recent employer. An Office claims examiner stated that this salary reasonably represented the salary for a manager in appellant's commuting area. In an August 14, 1979 decision, the Office issued its decision finding that appellant could perform the duties of a manager, service establishment. The Office indicated that its decision was effective August 16, 1979.

In an October 24, 1979 letter appellant requested reconsideration. He stated that at the time of his injury he was working at a second job. He contended that after his injury he could only work part-time approximately 30 hours a week. Appellant subsequently submitted a December 12, 1979 letter from a manager at Control Janitorial Co. which informed appellant that he was being temporarily terminated as of December 31, 1979 because of the loss of two large contracts for which appellant had been originally hired.

Appellant also submitted a December 12, 1979 letter from a manager of the state employment security department. He stated that, given appellant's severe limitation of no lifting over 10 pounds and the few opportunities for people in the position of manager, service establishment, appellant's chances for placement were extremely limited.

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[1] Department of Labor, *Dictionary of Occupational Titles*, DOT No. 187.168.

In a May 8, 1980 report, a vocational consultant indicated that in 1973 appellant began to work part-time as a janitor in addition to his duties at the employing establishment as a driver. In late 1974 or early 1975 appellant was promoted to a position as a part-time supervisor for a janitorial supply firm which involved inspecting work and delivering supplies to the job site. The consultant noted that appellant returned to this type of work about four months after his injury and had worked for service companies since then. He stated that appellant had not been able to continue the type of supervisory work he had performed earlier when he was required to do stair climbing, some lifting and delivery of supplies. He reported that appellant currently worked approximately 15 hours a week helping another janitorial supervisor and was earning approximately $400.00 a month. His duties included answering the telephone, controlling janitors use of supplies and inspecting work in single story buildings. The consultant commented that in the janitorial service trade there were two types of supervisory positions. He indicated that the first involved extensive on-site supervision and spot checks of work and required carrying and lifting over 10 pounds and a moderate amount of stair climbing. He commented that the second was an office position requiring the ability to keep accurate records, order supplies and deal effectively with clients. He concluded that appellant was physically unable to perform the first type of supervisory position and could not perform the second type of supervisory position due to his lack of ability in reading, spelling and math. The consultant stated that appellant's current part-time job could not be taken as evidence that he could function adequately as a full-time janitorial supervisor. He pointed out that appellant was working 15 hours a week helping a supervisor handle his overload and therefore was not doing and could not do what would ordinarily be expected of a supervisor. He commented that the description of a manager, service establishment, included such duties as record keeping, stock control and ordering supplies which were beyond appellant's level of ability given his difficulty with reading, spelling and math. He concluded that he knew of no job in which appellant could work adequately on a full-time basis. He recommended that it be acknowledged that appellant could only perform part-time work of the type in which he was currently engaged.

In a June 13, 1980 CA-1032 form, appellant reported that he had worked at Handyman Janitor Co. from October 1979 to December 1979 earning $1,200 a month and at the Well Done Service Co.

from February 1980 to the current time, earning $500 a month as a part-time supervisor.

The Office requested further information on the duties performed by appellant in his part-time jobs. In an October 6, 1980 letter a manager with Control Janitorial Co. indicated that appellant was associated with him as a manager. He stated that appellant did not have to carry out on-spot supervision or spot check work being done or had dealings with the employees. He reported that appellant had only little administrative work to do such as keeping records or ordering supplies. He noted that appellant had educational difficulties as well as a back injury. He stated that appellant's work was limited even though he was willing to do what he could at any time.

In a November 17, 1980 letter the president of Handyman Building Maintenance Company stated that appellant had the duties of on-site supervisor of employees and administrative duties of record keeping, hiring, firing and directing the activities of employees and dealing with clients. He reported that appellant was incapable of performing these duties because of an inability to interact with others in a positive manner, an inability to perform minor physical tasks and lack of educational background necessary to perform the administrative work.

In a December 1, 1980 memorandum, an Office supervisory claims examiner reviewed the evidence submitted by appellant and concluded that it established from a vocational standpoint that appellant could not compete in the open labor market for management positions. He recommended that the August 14, 1979 decision be set aside, that his compensation be adjusted to a 50 percent loss of wage-earning capacity retroactive to August 16, 1979 and that the case undergo further evaluation for job placement.

In a December 17, 1980 letter decision, the Office set aside the August 14, 1979 decision.

In a June 23, 1981 CA-1032 form, appellant indicated that he had worked for Well Done Service Co. as a janitor beginning January 1, 1980, earning $1,100 a month.

Appellant returned to work at the employing establishment on September 18, 1981 as a quality inspector. His duties involved checking to ensure that janitorial contractors were performing under their contracts. Appellant's position was one grade level below the position he had held at the time of his injury.

In a December 10, 1981 decision, the Office found that appellant was actually performing the duties of a quality inspection specialist and therefore had a 19 percent loss of wage-earning capacity, effective September 18, 1981.

In a September 16, 1982 letter to appellant the Office noted that in April 1975 his earnings in his part-time job changed from an hourly rate to a monthly rate and subsequently increased. The Office asked appellant how many hours a week he worked at the Well Done Service Co. before and after his employment injury. It also asked whether appellant's actual earnings in this job increased at the time he changed from an hourly to a monthly rate of pay and, if so, whether such an increase was because he was able to work longer for Well Done Service Co. since he was not working at the employing establishment.

In a November 2, 1982 letter, appellant stated that at the time of the injury, he was working approximately 20 hours a week for Well Done Service Co., earning $4.25 an hour. He reported that after his injury he started working as an "adviser supervisor" for two janitorial contracts. He indicated that his main function as supervisor for both establishments was to give instructions to the working supervisors by telephone and from time to time perform spot checks. He stated that his wages at that time rose to $750.00 a month for his supervision. He noted that he was also given $150.00 for the company's use of his pickup truck. He reported that he continued to work in this capacity during his disability until April 1976.

In a March 4, 1983 memorandum, an Office claims examiner stated that appellant's earnings from his part-time work rose $382.00 a month apparently because he was able to devote additional time to his part-time job as a result his inability to work at the employing establishment due to his injury. The claims examiner noted the $85.00 a week appellant had been earning prior to the time of the injury could not be considered in determining a loss of wage-earning capacity because of the Board's decision in *Irwin Goodman.*[2] She recommended that the additional $95.00 a week appellant earned subsequent to the injury because of the additional time he was spending on the job be considered as an actual wage-earning capacity. She stated that compensation should have been authorized at a loss of wage-earning capacity rate rather than for temporary total disability between June 19, 1975 and August 16, 1979. In an April 25, 1985 memorandum, a second Office medical adviser concurred with the recommendation of the first claims examiner. The second claims examiner recommended recomputation of compensation from June 19, 1975 through September 17, 1981 to reflect a 65 percent loss of wage-earning capacity. He stated that this amount should then be subtracted from the compensation already paid for the same period.

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[2] 23 ECAB 6 (1971).

In a July 31, 1986 decision, the Office found that appellant had received an overpayment of $10,935.81 in compensation because upon leaving his federal employment, he had increased his hours and responsibilities with his private employer. The Office further found that appellant was without fault in the matter. The Office advised appellant that if he disagreed with the fact or the amount of the overpayment, he had the right to submit new evidence in support of his contention. He was also advised that when a claimant is found to be without fault in the occurrence of an overpayment, recovery may not be made if it could be shown that such recovery would defeat the purpose of the law or would be against equity and good conscience. The Office further advised appellant of his right to a prerecoupment hearing.

In an August 27, 1986 letter, appellant requested a hearing before an Office hearing representative. At the December 9, 1986 hearing, appellant stated that he worked four to six hours a night in his second job as a janitorial supervisor. He stated that his duties in his second job were to ensure that all the employees got to their job, make sure everyone had the supplies and equipment to do the job and keep the contractor informed of anything he needed to know. After completing this work, appellant could go home and come back to spot check. Appellant stated that shortly after his employment injury, the contractor received another contract and asked appellant to become the supervisor on the second contract as well as the first contract. Appellant testified that the second contract did not lead to an increase in the hours he worked but only increased the number of people he had to talk to. He stated that his earnings increased in his second job because he had more responsibility.

In a March 12, 1987 decision, the Office hearing representative found that appellant had increased earnings after his injury. She further found that there was no evidence of record to establish that appellant did not do any more work. She concluded that as appellant had an increase in the number of people under his supervision, it did not seem reasonable that his income would more than double without added duties requiring increased time to perform such duties. The hearing representative also found that appellant was without fault in the creation of the overpayment. She however denied appellant's request for waiver of recovery of the overpayment.

In an April 23, 1987 decision, the Chief of the Branch of Hearings and Review revised the decision of the hearing representative. The Chief of the Branch of Hearings and Review found that it was clear that appellant worked from June 19, 1975 through September 17, 1981 and therefore was partially disabled. She concluded that the payment of temporary total disability compensation for that period was erroneous. She found that appellant therefore had received a $10,935.81 overpayment in compensation for the period June 19, 1975 to September 17, 1981. She further found that appellant was without fault in creating the overpayment but also found that recovery of the overpayment would not defeat the purpose of the Federal Employees' Compensation Act and would not be against equity and good conscience.

Appellant submitted an affidavit from the president of Well Done Service Co. The president stated that in 1975 his company had a contract to provide the janitorial service for the employing establishment and appellant worked as the supervisor. The president indicated that appellant provided direction to the janitorial staff and was available for telephone inquiries as to how work should be performed. He reported that appellant worked four to six hours an evening at the job. The president stated that in mid-1975 the company received another contract for janitorial services. He stated that he assigned appellant to the second contract. He indicated that appellant's responsibilities were the same as they were for the first contract. He commented that it was not necessary for appellant to work additional hours to perform the new responsibility. The president declared that because of appellant's expertise and his similar work he would have assigned appellant to the second contract and given him an increase in pay even if he had not been injured. He stated that appellant's increased salary was not made possible by or connected to the loss of appellant's primary job due to his injury.

In a May 1, 1987 decision, the Chief of the Branch of Hearings and Review stated that the new service contract caused an increase in appellant's income in proportion with the increase in responsibilities. She concluded that this represented a material change in appellant's concurrent pay rate. She stated that the Office had properly considered the additional income in computing his actual wage-earning capacity of 35 percent and then calculating the overpayment in compensation.

The Board finds that the Office improperly determined that appellant received a $10,935.81 overpayment in compensation.

In reviewing a determination that an overpayment of compensation has occurred the Board must determine whether there was in fact an overpayment. This requires a review of the Office's determination that appellant had a 65-percent loss of wage-earning capacity, based on the increase he received in actual wages from his second job.[3]

Section 8115(a)[4] states:

> "(a) In determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances is determined with due regard to—
>
> (1) the nature of his injury;
> (2) the degree of physical impairment;
> (3) his usual employment;
> (4) his age;
> (5) his qualifications for other employment;
> (6) the availability of suitable employment; and
> (7) other factors or circumstances which may affect his wage-earning capacity in his disabled condition."

In this case the Office's decision concerning the overpayment is based on the premise that the increase in earnings that appellant received in his part-time job as a janitorial supervisor after his April 18, 1975 employment injury fairly and reasonably represented his wage-earning capacity. The Office, however, had previously determined that appellant was performing the duties of a manager of a service establishment and had then set aside that decision. This decision was based on general reports concerning appellant's capacity for work. A state official stated that appellant's severe work limitations and the limited number of available positions for a manager, service establishment, greatly reduced appellant's chances for placement in the position. A vocational consultant, in an extensive report, indicated that appellant's duties in one position consisted of controlling the janitor's use of supplies, answering the telephone and inspecting work in single story buildings. The consultant pointed out that these duties were not what were normally expected of a manager. The consultant stated that appellant did not have the physical or vocational ability to perform the position of a janitorial supervisor. Appellant stated that his duties consisted of sending janitors to the appropriate job with the appropriate amount of supplies, reporting to the contractor and then being available for any questions. A manager of one janitorial company reported that appellant's work was limited due to his back condition and vocational background. The president of a second janitorial company stated that appellant was incapable of performing the duties of a supervisor due to his physical limitations, educational background and an inability to interact with others in a positive manner. This evidence, taken together, shows that appellant was either unable to perform the duties of a supervisor or performed duties of a makeshift or odd-lot nature. The earnings that appellant derived from this part-time employment during the period in question therefore do not fairly and reasonably represent his wage-earning capacity. The Office therefore erred in using these earnings as a basis for a determination that appellant had received an overpayment in compensation.

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[3] *See Samuel J. Russo*, 28 ECAB 43 (1976).

[4] 5 U.S.C. section 8115.

In addition the Board, in *Irwin Goodman* stated:

> "In the case before us, during part of the time in which appellant was totally disabled from his government job, he was able to work part-time at his job in private industry. However, his earnings during this period may not be considered in determining his wage-earning capacity since such earnings could not be considered in determining his pay rate." [5]

In this case appellant's position as a motor vehicle operator was not similar to his concurrent private employment as a janitorial supervisor. Therefore his earnings as a janitorial supervisor could not have been combined with his earnings in his federal employmemt to determine his rate of pay for compensation purposes even if they had increased after the injury.[6] Since these earnings could not be considered in determining appellant's pay rate they cannot be considered in determining a claimant's loss of wage-earning capacity.

Since the evidence establishes that appellant's actual earnings in his second job do not fairly and reasonably represent his wage-earning capacity and since the Board's decision in *Goodman* states that such earnings cannot be considered in determining wage-earning capacity, the Office must, pursuant to section 8115 of the Act, determine appellant's wage-earning capacity for the period in question with due regard to his injury and physical impairment, his usual employment, his age, his qualifications, and the availability of suitable employment. This the Office did not do. It did not formally specify the position on which it based its determination, it did not specify the physical requirements of any such position, it failed to establish that appellant was physically capable of performing the requirements of a selected position and it did not determine whether any such position was reasonably available in appellant's commuting area during the period June 18, 1975 to September 17, 1981 on a part-time basis.[7] The Office's determination of appellant's wage-earning capacity for the period June 18, 1975 to September 17, 1981 was therefore erroneous. As a result, the calculation of a $10,935.81 overpayment based on this loss of wage-earning capacity determination is also erroneous.

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[5] 23 ECAB at 11.

[6] *See Irwin Goodman, supra;* 5 U.S.C. section 8114(d)(3).

The decisions of the Office of Workers' Compensation Programs, dated May 1, 1987, April 23, 1987, and March 12, 1987 are hereby reversed.

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[7] *See Pope D. Cox*, 39 ECAB 143 (1987). *Sherwood T. Rodrigues*, Docket No. 87-519 (issued February 11, 1988); *Clifford C. Larson*, 39 ECAB 554 (1988).

In the Matter of Jill Thimmesch *and* U.S. Postal Service, Post Office, Wichita, Kans.

Docket No. 88-457; Submitted on the Record;
Issued March 31, 1988

Before Michael J. Walsh, David S. Gerson,
Michele von Kelsch

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant did not meet her burden of proof in establishing her claim; and (2) whether the Office properly denied appellant's claim for reimbursement of chiropractic expenses.

On February 20, 1987 appellant, then a 26-year-old letter carrier, filed a claim alleging she sustained injury on February 4, 1987, while "lifting a relay bag, to put into a tub." Appellant noted that at the time of injury she felt rest from normal activities would overcome the pain. She therefore rested for three days and then resumed work; however, the "strain and pressure" returned after a week to ten days.[1] On the reverse of the claim form appellant's supervisor noted that appellant had reported the incident on February 4, 1987, that continuation of pay was not controverted, and that appellant did not stop work.

In support of her claim appellant submitted eight duty status reports on Office of Workers' Compensation Programs Form CA-17, issued by the employing establishment addressed to and completed by Dr. K. Van Winkle-Patyk, a chiropractor. In the first CA-17 form completed by Dr. Van Winkle-Patyk on February 20, 1987 the chiropractor noted that he had examined appellant on February 20, 1987 and diagnosed lumbosacral strain accompanied by sciatic neuritis bilaterally. He stated appellant was able to perform her regular work duties; however, she could not lift over twenty pounds. Following examinations on February 23, February 25, February 27, and March 2, 1987, Dr. Van Winkle-Patyk reported that appellant could not perform her regular work activities due to the twenty-pound weight restriction for lifting and carrying.

On March 10, 1987 the Office requested that appellant provide further information including a detailed description of how the injury occurred, the names of any witnesses, and a description of the immediate effects of the injury. The Office also requested that appellant's physician submit a medical report, and that appellant submit copies of any x-ray reports read by her chiropractor.

The Office thereafter received two Form CA-17s completed by the chiropractor on March 4 and March 16, 1987 which restricted appellant's lifting and carrying activities to twenty pounds. On March 11, 1987 Dr. Van Winkle-Patyk submitted a Form CA-17 reporting that appellant was able to resume regular work activities. On March 19, 1987 appellant submittted a report from Dr. Larry K. Wilkinson, a Board-certified emergency medicine physician, which stated as follows:

> "I examined Mrs. Thimmesch and reviewed her past medical records on March 11, 1987. Her physical examination was within normal limits and in my opinion this employee may return to work without limitations. Furthermore, in my opinion she does not require any further medical treatment."

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[1] Although the appellant states in her claim that she "rested for three days" it is not clear from the record whether appellant was disabled from work activity, as defined by the Act, at any time following the alleged injury.

Accompanying Dr. Wilkinson's report was an emergency room record from St. Joseph's Hospital dated March 11, 1987 reporting a diagnosis of resolved back strain and noting Dr. Wilkinson's conclusion that no further treatment was required. A work restriction evaluation form also accompanied Dr. Wilkinson's report, completed on March 12, 1987 that restricted appellant's lifting activities to 75 pounds.

By compensation order dated April 16, 1987 the Office denied appellant's claim finding that appellant had not submitted sufficient factual and medical evidence to meet her burden of proof, and finding the medical evidence submitted from the chiropractor was not admissable as medical evidence because it did not establish the presence of a subluxation by x-ray. The Office also informed appellant that further medical treatment was not authorized.

The Board finds that appellant did not meet her burden of proof in establishing her claim.

A person who claims benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of her claim, including the fact that she sustained an injury while in the performance of duty.[2] As part of such burden, appellant must submit rationalized medical evidence, based upon a specific and accurate history of injury, showing a causal relation between the employment incident and the condition.[3]

In this case appellant has not established the essential elements of her claim. Although the Office, on March 10, 1987 requested that appellant provide a detailed description of how the injury occurred, the names of any witnesses and the immediate effects of the injury, appellant did not respond to the Office's request. Furthermore, neither the medical report submitted by Dr. Wilkinson, nor the Form CA-17s submitted by Dr. Van Winkle-Patyk provide any specific history of injury or offer any rationalized statement showing causal relation between the alleged employment incident and appellant's low back condition. Appellant, therefore has not met her burden of proof in establishing her claim.

With respect to the issue of reimbursement of chiropractic expenses, the Board finds that the case is not in posture for decision.

Ordinarily chiropractic services are not reimbursable if treatment is not offered for a condition demonstrated to exist by x-ray.[4]

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[2] *See Daniel R. Hickman*, 34 ECAB 1220 (1983); *Clifford Eaton*, 34 ECAB 1350 (1983).

[3] *See Virginia Mary Dunkle*, 34 ECAB 1305 (1983).

[4] **5 U.S.C. section 8101(3) provides in pertinent part:**

> **"Medical, surgical and hospital services and supplies by . . . chiropractors, . . . within the scope of their practice as defined by state law. Reimbursable chiropractic services are limited to treatment consisting of manual manipulation of the spine, to correct a subluxation as demonstrated by x-ray to exist. . ."**

The Board finds, however, that the Office has not exercised its discretionary authority to determine whether the CA-17s issued by the employing establishment constituted authorization for treatment by Dr. Van Winkle-Patyk.

The Federal (FECA) Procedure Manual provides that Office form CA-16 is the official form for authorizing examination or treatment at the expense of the Compensation Fund. It is used primarily by the official supervisor to refer an employee injured by accident to a local qualified private physician or hospital of the employee's choice.[5] Further, the Office regulations provide that form CA-16 shall be used primarily for traumatic injuries,[6] and that in order to be valid, a form CA-16 must give the full name and address of the duly qualified physician or medical facility authorized to provide service and must be signed and dated by the authorizing official.[7] The period for which treatment is authorized by form CA-16 is limited to 60 days from the date of issuance, unless terminated earlier by the Office.[8]

The regulations also provide for the use of form CA-16 by the employing agency for authorization of medical treatment in "doubtful cases" in order to secure necessary diagnostic study and emergency treatment pending receipt of advice from the Office. The regulations state in pertinent part:

> "If the medical examination or other information received subsequent to the issuance of authorization for treatment discloses that the condition for which treatment was rendered is not due to an injury, the person issuing the authorization shall immediately notify the employee and the physician or hospital that no further treatment shall be rendered at the expense of the Office. In cases of an emergency or cases involving unusual circumstance, the Office may, in the exercise of its discretion, authorize treatment otherwise than as provided for in this part, or it may approve payment for medical expenses incurred otherwise than as authorized in this section." [9]

The record establishes that after appellant filed her claim on February 20, 1987 she was issued eight Office form CA-17s [duty status report] in which the official supervisor was directed to designate the name and address of the medical facility providing services. The CA–17s were addressed to K. Van Winkle-Patyk, D.C., P.A., Dr. Van Winkle-Patyk's chiropractic office. Although the Office form CA–16 is the official form which authorizes examination and/or treatment at the expense of the Office, in *George Witte* [10] the Board recognized the discretionary authority of the Office to consider a CA–17 as an authorization for medical treatment. In *Merton J. Sills,* [11] the Board recognized that form CA-17s are utilized as substitutes for the form CA–16 to authorize treatment, and that the Office should specifically review each form CA-17 to determine whether it authorized treatment at the expense of the Office. In the present case, the Office has not exercised its discretionary authority to detemine whether the CA–17s issued to Dr. Van Winkle-Patyk should be construed as authorizing treatment.

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[5] Federal (FECA) Procedure Manual, Official Authorization for Examination and/or Treatment, Chapter 3-300(1), (October 1978).

[6] 20 C.F.R. section 10.402(a).

[7] 20 C.F.R. section 10.402(b).

[8] *Id.*

[9] 20 C.F.R. section 10.403.

The case will be remanded to the Office to make a determination whether the CA–17 forms authorized appellant's medical treatment. Following such determination, the Office shall issue a *de novo* decision with respect to reimbursement for services rendered by Dr. Van Winkle-Patyk.

The decision of the Office of Workers' Compensation Programs, dated April 16, 1987 is affirmed in finding that appellant did not meet her burden of proof in establishing her claim; with regard to the issue of reimbursement of chiropractic expenses, the case is set aside and remanded to the Office for further development in conformance with this decision.

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[10] *George Witte,* 38 ECAB 585 (1987).

[11] *Merton J. Sills,* 39 ECAB 572 (1988).

In the Matter of Bruce A. Henderson *and* U.S. Postal Service, Post Office, Des Moines, Iowa

Docket No. 87–920; Submitted on the Record;
Issued April 6, 1988

Before Michael J. Walsh, Michele von Kelsch, Willie T.C. Thomas

The issue is whether appellant has sustained an injury in the performance of duty as alleged.

On July 23, 1985 appellant, then a 28-year-old letter carrier, filed a claim for multiple fractures of the left leg, back strain and left wrist and elbow strain sustained on September 16, 1983. Appellant alleged that on that date he was returning from his doctor's office where he had received treatment for an employment-related injury when he was involved in a motor vehicle accident.[1] Appellant explained:

> "I was going to Dr. Blessman for an on-the-job injury on Wednesday, September 14, 1983, I was seen by Dr. Blessman for the injury that I had obtained at work, he instructed me to return to his office on the 16th of September which was my scheduled day off, and at that time he would let me know when I could return to full duty.
>
> "On the 16th I did go back at my scheduled time and received the release form for the Post Office stating that I could return to full duty. I went directly over to the Post Office with the requested information and left there to go home. After I had turned right on University and was approximately 25 feet up the road a car hit me from the left side which was the cause of the accident."

The employing establishment controverted appellant's claim, alleging that his injury was a result of an independent intervening cause attributable to appellant's own intentional conduct. It explained that appellant failed to take the most expeditious route from Dr. Blessman's office back to his own residence. As a result of taking a longer route appellant placed himself at the location where the accident took place. In addition, the employing establishment noted that appellant was not instructed to visit the post office after his doctor's visit on September 16, 1983. Appellant was on annual leave at the time of the accident.

By letter dated November 12, 1985 the Office of Workers' Compensation Programs asked appellant to provide additional information on whether he was in the performance of duty at the time of the September 16, 1983 injury. Specifically, the Office wanted to know the route appellant took from the doctor's office to his own residence, as well as information on appellant's September 6, 1983 employment injury. Appellant did not provide the requisite information.

By compensation order dated December 5, 1985 the Office rejected appellant's claim for compensation, finding that he failed to meet his burden of proof by not submitting the requisite information.

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[1] Appellant explained the reason for his delay in filing a claim by stating that he was told that he was not entitled to file a claim by management.

On November 25, 1985 the Office received a memo from appellant's supervisor which stated:

> "On the day in question [appellant] was on annual leave. He had a doctor's appointment on a prior problem. I told him to let us know what the outcome was. I did not specify to stop at the post office."

On February 24, 1986 the Office received appellant's request for reconsideration of the prior decision. In support of his request appellant submitted a map showing that the employing establishment was on the route he took from the doctor's office to his home on September 16, 1983.

By compensation order dated May 20, 1986 the Office denied modification of the prior order, finding that the evidence submitted in support of the application was not sufficient to warrant modification of the prior order.

On October 30, 1986 the Office received appellant's request for reconsideration of the May 20, 1986 compensation order.

In support of his claim appellant submitted evidence with respect to the September 6, 1983 employment injury. The record indicated that on September 8, 1983 appellant filed a claim for compensation alleging that he pulled muscles in his back on September 6, 1983 when he lost his balance on a set of stairs. Appellant stopped work on September 6, 1983.

The Office of Workers' Compensation Programs referred appellant to a United States Postal Service Contract Physician, Dr. James Blessman, a Board-certified family practitioner, for treatment.

Appellant was first treated by Dr. Blessman on September 8, 1983, at which time his injury was diagnosed as "acute back strain."

The Office accepted appellant's claim for a back strain.

Appellant continued to be treated by Dr. Blessman on September 9, 1983, September 12, 1983 and September 14, 1983. At each of these visits appellant was treated with ultrasound with HVG and hot packs. In his notes of the September 14, 1983 treatment Dr. Blessman stated as follows:

> "Seen today follow up his back strain. Seems to be improving, however, still has considerable pain in the paraspinous mus-

> cles. I feel that it is safe for him to return to light duty casing mail, however, I do not want him carrying the pack. He was asked to return to light duty today. Return here Friday for repeat treatment."

In a report of the September 16, 1983 examination Dr. Blessman stated:

> "Seen today for follow up of the above back strain. He is coming along quite well. Did not feel that he needed additional physical therapy today. He was instructed to return to full duty on Monday. To return here as needed."

Dr. Blessman wrote a note for appellant stating that he could return to regular duty on September 19, 1983.

After his examination with Dr. Blessman appellant drove to his employing establishment to submit the note indicating that he was fit to resume full duty. After appellant left his employing establishment, the motorcycle he was driving was struck by an automobile. The accident occurred in the 100 block of East University, which was not on the premises of the employing establishment.

By compensation orders dated December 2, 1986 the Office vacated its earlier decisions, and rejected appellant's claim on the grounds that he was not in the performance of duty at the time of the September 16, 1983 accident.

On appeal appellant's authorized representative alleges that appellant's visit to Dr. Blessman on September 16, 1983 was for authorized treatment of an already accepted work-related injury. He stated that appellant was asked to inform his employing establishment of the outcome of his doctor visit. Therefore, after appellant left the doctor's office he stopped by the employing establishment in order to deliver the note saying that he was fit-for-duty. The accident occurred after appellant left the employing establishment, but both the employing establishment and the site of the accident were on a direct route between Dr. Blessman's office and appellant's home. He stated as follows:

> "In [appellant's] case, his injury was sustained when leaving a doctor's office occasioned by a compensable injury, after briefly stopping by his employing agency (which was on a direct route to his home) for reasons directly related to his compensable injury. . . .
>
> "Even if it is found that [appellant] deviated from his trip home in stopping by the employing agency, he was at the time

> of the accident back on the direct route to his home; and the Board has held in regard to business trips that:
>
> > 'An indentifiable deviation from a business trip for personal reasons takes the employee out of the course of his employment *until he returns to the route of the business trip. . . .*'
>
> "While [appellant] was not on a 'business trip' as such, he was on a trip that took him from and back to his home for purposes of medical treatment for a compensable injury."

On appeal the Director of the Office of Workers' Compensation Programs alleges that the accident occurred when appellant was returning home *after* he had delivered medical certification of his ability to return to work to the employing establishment. The Director concluded that the gratuitous delivery of the medical release form was too remote from the employment to involve a causal relationship between the subsequent accident and the employment.

The Board finds that appellant sustained an injury in the performance of duty on September 16, 1983, as alleged.

Congress, in providing for a compensation program for federal employees, did not contemplate an insurance program against any and every injury, illness, or mishap that might befall an employee contemporaneous or coincidental with his employment; liability does not attach merely upon the existence of an employee/employer relation.[2] Instead, Congress provided for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[3] The Board has interpreted the phrase "while in the performance of duty" to be the equivalent of the commonly found requisite in workers' compensation law of "arising out of and in the course of employment." In addressing this issue, the Board has stated:

> "In the compensation field, to occur in the course of employment, in general, an injury must occur: (1) at a time when the employee may reasonably be said to be engaged in his master's business; (2) at a place where he may reasonably be expected to be in connection with the employment; and (3) while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto." [4]

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[2] *Minnie M. Heubner*, 2 ECAB 20 (1948); *Christine Lawrence*, 36 ECAB 422 (1985).

[3] *See* Federal Employees' Compensation Act 5 U.S.C. section 8101 *et seq.*

[4] *Carmen B. Guitierrez*, 7 ECAB 58 at 59 (1954).

In the present case Dr. Blessman requested that appellant return to his office on September 16, 1983 for further treatment of an already accepted employment related injury. At this time Dr. Blessman found that appellant was fit-for-duty and wrote a note to his employing establishment to that effect. After leaving Dr. Blessman's office appellant dropped the note at his employment establishment, and then proceeded home. The accident occurred on a direct route between appellant's home and Dr. Blessman's office.

As the Board has noted in *Chet Kelley*,[5] *Larson*, in his treatise on Workmens' Compensation, states: "When an employee suffers additional injuries because of an accident in the course of a journey to a doctor's office occasioned by a compensable injury, the additional injuries are generally held compensable." [6] *Larson* notes exceptions to compensability, however, in such cases where there is "some added factor weakening the causal connection" such as doubt about whether the trip was really authorized, when the purpose of the trip was not treatment by a doctor but examination for purposes of meeting the employer's requirement of a physical fitness certificate, when the original injury was not work connected.[7]

The Board finds that under the above principles set forth in *Larson*, a journey to a doctor's office occasioned by a compensable injury is covered under the Federal Employees' Compensation Act. The purpose of appellant's visit to Dr. Blessman was clearly for treatment of a work-related injury. In a report dated September 14, 1983 Dr. Blessman stated: "Return here Friday [September 16, 1983] for repeat treatment. The fact that Dr. Blessman found appellant fit-for-duty and gave him a note to that effect does not change the fact that the "purpose" of the trip was for treatment. The question therefore is whether the accident occurred while appellant was still "in the course of a journey to a doctor's office" or if appellant's "journey" had completed when he stopped at the employing establishment to deliver the fitness-for-duty certificate. The site of the accident was on a direct route between Dr. Blessman's office and appellant's home. While appellant briefly "deviated" from his journey by stopping at the employing establishment, he had completed this "deviation" at the time of the accident, and was on his way home. As the Board has previously held with respect to business trips: "An identifiable deviation from a business trip for personal reasons takes the employee out of the course of his employment until he returns to the route of the business trip unless the deviation is so unsubstantial that it may be disregarded." The same principle is applicable in this case where the accident occurred on a direct route between appellant's home and Dr. Blessman's office. This case is in fact even stronger then most because appellant's "deviation" was for business reasons, and was not of a personal nature. Therefore, appellant was in the performance of duty at the time of the injury because he was on his way home following a trip to his doctor occasioned by a compensable injury.

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[5] *Chet Kelley*, Docket No. 86–364 (issued March 31, 1986).

[6] Larson, *Workmen's Compensation Law*, Vol. 1, section 13.13.

[7] Larson, *Supra* 3–382.

The decision of the Office of Workers' Compensation Programs dated December 2, 1986 is hereby reversed. The case is remanded for further development of the medical evidence to determine whether appellant sustained any disability causally related to the above employment injury.

Michele von Kelsch, Alternate Member, Concurring.

Although I concur that appellant's injuries, sustained as a result of a motor vehicle accident on his way back home from delivering to his employing establishment a return to regular duty certificate on account of a previous employment-related injury are compensable, I do so on a different legal premise.

The majority bases its holding on the completed deviation theory; that is, the injury occurred after appellant had resumed his "business route" home from treatment from a physician for an employment injury. Although acknowledging a "deviation" to the employing establishment, the majority contends the deviation was over and appellant had resumed his route.

I contend that the completed deviation and resumption of business route theory is both factually and legally unsound and should not be applied in this case.

The facts of the case reveal that appellant's deviation had not ceased and appellant had not yet resumed his "business route" between the doctor's office and his home. The accident occurred as appellant, on his motorcycle, attempted to enter the intersection of University Avenue from Illinois Street, the street of the employing establishment. As vividly depicted on both the investigating police officer's report, and appellant's own street maps, the accident occurred while he was still on his "deviation" on the street of the employing establishment. Although he was about to resume his route, eastbound on University Avenue, he was still on Illinois Street and the motor vehicle accident interrupted his attempt to return to his "business route." Thus, appellant failed to resume his "business route," and therefore one of the supports of the majority opinion falls.

More importantly, however, the legal concept of completed deviation (which I have just shown is unfounded) and resumption of the business route is not applicable to this case.

Deviation is a principle applicable to an employee, who while engaged in his master's business, at a place where he may reasonably be expected to be in connection with his employment, and while reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto, deviates from the activities of his employment for a personal mission, and thereby ceases to be within the protection of his employment and therefore an employment compensation act.

A valid deviation case is that represented by *Leopold Colarusslo,*[1] a letter carrier who had been on his mail delivery route, but had "deviated" several blocks out of his way to eat lunch. The Board found that he had deviated from activities incidental to his employment, and therefore had taken himself out of the course of his employment. Other typical examples of deviations from a business route is picking up eyeglasses and a watch,[2] cashing a salary check,[3] returning from a funeral [4] and the ubiquitous lunch.[5]

Note, that in all the typical cases, the employees had been engaged in the master's business, and had been reasonably fulfilling the duties of the employment. That is not the case here. Mr. Henderson was not engaged in his master's business, nor was he fulfilling the duties thereof. His coverage, according to the majority, attaches because he was on his way home from doctor's treatment for an employment-related condition. Travelling en route to or from a doctor's office for treatment is not "fulfilling the master's business," but rather coverage should attach as a logical consequence of the medical treatment not as a consequence of fulfilling employment duties.

What the majority further overlooks is that appellant's "deviation" to the employing establishment to deliver his physician's certificate to enable him to return to his regular duty was not a deviation of a personal mission, as lunch or picking up a watch, but rather it was part and parcel of the consequences of his employment-related injury.

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[1] Docket No. 86-1762 (issued February 11, 1987).

[2] *May T. Evans*, 12 ECAB 289 (1961).

[3] *Julianne Harrison*, 8 ECAB 440 (1955).

[4] *Alma F. Nunes*, 10 ECAB 501 (1959).

[5] *George R. Timmons*, 24 ECAB 265 (1973); *James E. Johnston*, 35 ECAB 695 (1984).

It is an anomaly to say that the bringing of a return to regular work certificate necessitated by an employment-related injury, an injury which had caused initially total and then partial disability, was a "deviation for personal reasons." The majority's application of the concept of deviation and resumption of business route stretches this principle to attempt to cover a situation it was never meant to encompass. Additionally, the majority fails to inform us wherein the *Henderson* case comes within the three prong test cited in the *Gutierrez* case.

Rather, I would find appellant's injury compensable on a more direct basis. Appellant had initially ventured out that date to undergo treatment at his doctor's office on account of residuals due to his employment-related injury. Appellant had been released to light duty work, but upon examination, Dr. Blessman determined that appellant did not need any further treatment and released him to regular duty and gave appellant a statement to that effect.

Appellant proceeded to the employing establishment to deliver the physician's certificate attesting to his ability to return to regular work. I would find this trip as an intervening cause that breaks the chain of causation of the trip to and from the physician's office.

However, unlike the *Schmick* case,[6] wherein the employee sustained injury while delivering a fitness-for-duty certificate necessitated by a nonemployment-related illness, I would find Mr. Henderson's "new trip" to and from the employing establishment, to deliver a return to regular duty certificate necessitated by an employment-related injury, compensable as being a consequence of the employment injury. Appellant was performing an activity reasonably incidental to his employment, and but for the employment injury, a certificate of return to regular duty would not have been necessary. In delivering the certificate of ability to return to regular work after an employment-related disabling period, appellant was performing a reasonable and necessary act at the time and place of injury, to the end that the operation of his employer's business might be properly conducted. It was a furtherance of his employer's interest,[7] that in an expeditious manner, appellant be removed from light duty and resume his regular duty, all the better to accomplish "his master's business."

In summary, I would find that the injuries sustained by appellant, while returning home from delivering a certificate for regular duty necessitated by an employment-related injury, compensable as a consequence of that employment injury.

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[6] *Marilyn K. Schmick*, 33 ECAB 217 (1981).

[7] *See Catherine M. Simonds*, 6 ECAB 624 (1954).

On the other hand, I cannot subscribe to the completed deviation-return to business route theory of the majority since: (1) appellant had not completed his "deviation" nor had he resumed his business route; (2) appellant was not on his "master's business" while going to or coming from doctor's treatments (rather it would have been covered within the ambit of medical treatment/expenses); and (3) the so called "personal deviation," was in reality, business related.

In the Matter of JOHNSON K. YAZZIE *and* DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, Shiprock, N.M.

Docket No. 87-1605; Submitted on the Record; Issued April 6, 1988

Before MICHAEL J. WALSH, GEORGE E. RIVERS, MICHELE VON KELSCH

The issue is whether appellant had disability subsequent to June 29, 1984, causally related to his June 1, 1984 employment injury.

On June 1, 1984 appellant, then a 53-year-old maintenance worker, filed a claim for injuries received when the government truck he was driving that date was rear-ended by another government vehicle. The cause of injury was described as follows: "[Appellant] hit his head against the rear window and had minor cuts on his head and elbow." The nature of the injury was noted as: "Cut left elbow and neck."

Appellant was taken by emergency medical unit to the Public Health Service Indian Hospital (IHS) where he was treated by Dr. Dave Long for complaints of neck pain radiating to his right shoulder. Appellant was found to have increased tenderness at the base of his neck, pieces of glass on his back, and an abrasion on his elbow. Appellant's neuro-vital signs revealed that although his pupils were equal in size, his left pupil was minimally reactive to light. Appellant was treated with analgesics and a muscle relaxant; he was given a cervical collar to support his neck and was discharged.

Appellant stopped work on June 4, 1984, and returned to the clinic on June 5, 1984 where he complained of pain in the posterior scapular region, right shoulder area, and right back. Dr. Long found minimal tenderness of appellant's right trapezius and scapula and noted that neurological signs were normal. Dr. Long diagnosed "resolving trapezius strain" and prescribed continued use of the cervical collar as necessary. A June 5, 1984 physical therapy report noted that appellant complained of pain in his right occipital region and in both sternocleidomastoids (lateral cervical muscles) as well as pain in his right upper trapezius. It was further noted that appellant had "felt a pop in his neck on June 3, 1984, with increased pain since the accident." A June 5, 1985 radiology report of appellant's cervical spine and right shoulder examination noted no significant abnormalities. Appellant returned to work on June 6, 1984.

In a June 8, 1984 CA-16 attending physician's report Dr. Long diagnosed "right trapezius strain (whiplash)," discharged appellant from treatment that date, and opined that he could resume regular work as of June 11, 1984.

In a June 25, 1984 letter the Office of Worker's Compensation Programs advised the employing establishment that, based upon receipt of appellant's CA-1, the evidence of record supported appellant's claim and continuation of pay should be granted.

Employing establishment records noted that Dr. Parker released appellant to return to work on June 29, 1984.

In an August 14, 1984 letter the employing establishment submitted an August 11, 1984 attending physician's report from Dr. Floyd C. Parker, a general practitioner, which noted the cause of appellant's injury as "hit from rear while riding in a government pickup." Dr. Parker described treatment given on June 14, 1984 as "checked, x-rays, and oral prescription," and opined that appellant's present disability was due entirely to this injury. Dr. Parker did not respond for what period appellant would be unable to work.

The record contains a January 12, 1985 attending physician's report from Dr. Parker describing treatment that date as follows: "checked, CPK [creatinine phosphokinase], EKG [electrocardiogram], cholesterol, triglyceride, and oral [prescription]." Dr. Parker again opined that appellant's present disability was due to the employment injury.

The Office accepted appellant's claim for "trapezius strain."

In a March 13, 1985 fitness-for-duty examination report, Dr. Parker noted that appellant had atherosclerotic heart disease and high blood pressure. In a March 14, 1985 report Dr. Parker stated:

> "[Appellant] had a severe myocardial infarction in July 1981 . . . [and] has been sustained on oral medication with excellent results until a declining of his health in the past year with increasing angina."
>
> * * *
>
> "Assessment of his present clinical status is he cannot do his job as directed now, he falls out of the stature of lifting 100 lbs., working alone and working in high places at this time and probably will deteriorate. His diagnosis is Arterio Sclerotic Heart Disease with progression and varying angina and high blood pressure. There is no full recovery from this however it may be helped with various changes of drugs. [H]e needs to be reevaluated either for a minor desk type job or no labor type job at all. He is complaining of more angina and especially more fatigue which resolves with rest. . . . I recommend restrictions that prohibit [appellant] from doing his present work task . . . [and] performing specific duties of that position . . . which he now holds. He may be able to work in a more sedentary job without doing the lifting, high places, etc."

Appellant retired due to his disability in May 1985.

Indian Health Service clinic notes dated March 21, 1985 reported that appellant complained of neck pain, headaches, and stiff neck originating from the time of his accident in June 1984. Examination revealed mild tenderness over his trapezius and neck muscles bilaterally almost to his occiput. X-rays showed some osteoarthritis of his cervical spine but no evidence of acute traumatic changes. The IHS physician diagnosed chronic cervical muscle strain and scheduled a disability physical exam. A subsequent clinic report that date noted appellant "still complains of loss of memory, neck pain, right scapular pain . . . . All cervical motions painful with over pressure, tenderness to compression at T5–6 area, pain in right scapula with thoracic rotation to the right, extension, flexion, and side bends," and observed that appellant was "difficult to evaluate clearly as [he] does poorly following commands."

In a March 25, 1985 statement, appellant's supervisor noted that since September 1984, [appellant] had been "unable to perform the following tasks adequately which are part of his duties: (1) Lift the recommended weight; (2) Crawling and working in cramped areas; (3) Work overhead for a period of time; (4) Tendency in misplacing his tools and not completing work assigned him due to memory."

In an April 4, 1985 report Dr. Parker diagnosed arteriosclerotic heart disease, recurrent fracture of neck, and head trauma, and opined that appellant's disability was not directly related to a previous medical condition. Dr. Parker opined that appellant was disabled from engaging in any occupation from June 1, 1984 until "unknown."

In an April 5, 1985 report Dr. Parker stated:

> "[Appellant] has full range of motion in his neck, he has full extension and flexion, he has some guarding on extension, but I believe this is an imaginary functional one more than a reality one. He does seem to be forgetful but this is nothing new since his coronary and is not due to anything on his medication. [Appellant] did suffer a moderate concussion, he did suffer [a] whiplash injury but that is the extent of it. . . . I believe [appellant's] function is alright, he may get a little dizzy looking up and not be able to see well. This might be due to his age and his atherosclerosis of the generalized arterial system of his body which maybe causing a decreased blood flow in looking up. It is also conceivably possible that a whiplash injury would antagonize blood flow to his brain through myositis and tension and therefore further reduce blood flow to his head in certain positions."

A CA-16 attending physician's report dated April 23, 1985 from the IHS clinic noted that appellant was partially disabled from June 1984 to June 1985, and might be able to resume light work depending upon his condition in May 1985. An April 23, 1985 IHS clinic report noted a diagnosis of "concussion" and " whiplash" and that appellant complained of being forgetful. Appellant's physical examination was normal but he had cervical spine tenderness and a spasm at T-4 with decreased range of neck motion and pain. Both his short term and long term memory were judged to be "okay." A fitness-for-duty examination given at that time concluded that appellant had "mild limiting conditions secondary to neck [muscle] spasm."

In an April 24, 1985 report, Dr. Lynn H. Haines, a Board-certified neurosurgeon, noted as follows:

> "[Appellant has] a history of interscapular and bilateral shoulder pain, suboccipital and generalized headaches and definite changes in mentation and mental status, allegedly of onset, following an on-job injury which occurred on June 1, 1984. [He]

was . . . injured in a two-truck motor vehicle accident, in which his smaller pickup was struck from behind by a much larger vehicle, inflicting considerable damage on the . . . automobile, as well as an apparent extension/hyperflexion injury to his neck. He apparently, was thrown backwards with enough force to break out the back window with his head and then was thrown forward against the steering wheel of his vehicle. [Appellant] has no good recall of the accident. Most of the details have been provided by other individuals and it would appear, therefore, that he had a concussion or contusion, in addition to the flexion/extension injury of the neck. . . .

"Currently, [appellant] complains of continued and persistent interscapular pain and discomfort, suboccipital headaches, which often are generalized, and pain, which he refers to in the posterior region of both shoulders. Of greater concern to his family and to his employer, has been a change in his mental status . . . ."

"Examination today found [appellant] to be alert and cooperative. He conversed through his daughter as an interpreter but, on occasion, also, was able to speak and converse in the English language.[1] He exhibits a decrease in range-of-motion of the neck in all axes. This appears to be pain induced, rather than a mechanical limitation and is associated, also, with some soreness in the interscapular area and over the external occipital protuberance and superior nuchal line. I was not impressed by crepitus with motion, nor was there any evidence of major neurologic deficit or focal lesion, aside from the aforementioned reported change in mental status. There is a tendency on [appellant's] part to give way on muscle testing but this appears to be pain induced. . . . Due to the language barrier, it was difficult for me to trace out, in any great depth, the change in mental status. The changes are, however, obviously severe enough to concern the family and I must assume their validity, given the reports by his daughter and, also, accompanying complaints and concerns made by his employer. . . ."

"It's quite possible, that [appellant] has a residual of a cervical strain, i.e., flexion/extension injury and may well have underlying cervical spondylosis which has produced his interscapular pain and discomfort. This, may also account for some of his headaches but his most worrisome complaints or symp-

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[1] The Board notes that appellant speaks primarily Navajo.

> toms, are those consistent with a dementia or organic mental syndrome and one must rule out a possible chronic subdural hematoma, post-traumatic seizure disorder or, perhaps, diffuse cerebral atrophy due to vascular insufficiency. [Appellant] is a relatively young man and given his heart disease, which was of onset at age forty-nine, it is not unlikely that he has some ongoing cerebrovascular insufficiency, as well. Finally, [he] may have spondylosis in the neck, to such an extent that there is some vascular compromise."

In a May 1, 1985 follow-up report Dr. Haines noted as follows:

> "[Appellant's] EEG is normal. . . . He also had a normal CT scan of the head, completed with and without contrast, and has on his cervical spine films some degenerative changes, i.e., spondylosis at C5-6 but the changes are primarily anterior to the interspace. There is also some narrowing but certainly this would not, in my mind, explain the severity of his headaches and the changes in mentation, etc.
>
> "I do feel it warranted at this time to complete a psychometric battery and have scheduled same with Dr. Bob Sherrill. The patient has been advised that he must be accompanied by an interpreter and he can be afforded this assistance by either his wife or daughter, both of whom, appear to speak English very well."

By a May 1, 1985 letter, the Office advised appellant that evidence received was insufficient to reopen his claim and requested that he have his physician provide an opinion with medical rationale as to the current relationship between appellant's current disability and his June 1, 1984 injury.

In a May 28, 1985 report, Dr. Robert Sherrill, Jr., a psychologist, noted as follows:

> "[After the accident appellant] was reportedly unconscious for approximately five to ten minutes. Immediate sequelae . . . included a laceration in the back of the head; headaches; back pain; and memory problems. He was treated initially by Dr. Floyd Parker, who . . . diagnosed . . . a concussion and whiplash. He attempted to continue with his job [but] . . . found that he would frequently forget his tools, leaving them all around and also would forget at times how to do previously well-learned tasks. His foreman . . . noted . . . that he would forget complete work requests, and that he was unable to do

work where he had to look upwards. He . . . retired reluctantly in March; he had hoped to work about another seven years in order to obtain regular retirement.

"[Appellant] has worn glasses for reading for about the last seven years. Since his accident, he reported occasional episodes of visual blurring. . . . He described weakness and easy fatigability since his accident. He reported almost constant headaches now, which he said were made worse by physical or mental exertion. . . . He described continuing generalized difficulties with memory. . . . As the result of his current difficulties maintaining spatial orientation, he now has to have someone with him when he drives, in order to cue him concretely which way to return, remind him of approaching red lights, etc. He remarked that he had driven through several red lights since his accident, which is why his wife or other relatives always accompany him now. He admitted to a variety of emotional disturbances since his accident, including generalized anxiety and depression and increased irritability. . . . He admitted to a period of heavy drinking when he was a young man, but said that he had drunk nothing at all for about the past 20 years (his daughter confirms this). He denied any abuse of prescription drugs or use of illegal drugs. He currently takes medication for his headaches, and his blood pressure. He denied any previous head injuries.

"He was administered a comprehensive battery of neuropsychological tests. . . . His cognitive tests showed a pattern of some skills substantially intact, and two specific areas of deficit. . . ."

* * *

"The two specific areas of deficit were those of sustained attention; and impaired strength and speed in his right hand, as compared to his left."

* * *

"In right handed males with no familiar history of left handedness, the right hand should be about 10 percent stronger and 10 percent faster than the left. In the absence of any evidence of peripheral damage to the right arm or shoulder, the discrepancies in efficiency between the two hands are interpreted as reflecting some localized dysfunction in the left cerebral hemisphere. The discrepancy between his deficits on the task of

> complex tactile problem-solving, as compared to his relatively good scores on other skills of problem-solving, suggest that there is more dysfunction in the posterior portions of the cortex.
>
> "Examination of appellant's PSI showed the scale for defensiveness to be well within normal limits. This implies that he was not trying to skew his answer toward 'looking good' or 'looking bad,' consciously or unconsciously. The scale for generalized anger and emotional alienation was relatively low. This corresponds well with appellant's self-report of a stable personal and vocational history. He showed a moderate elevation on a scale of perceiving himself to be out of control of his mental processes; and a highly significant elevation on a scale for general neuroticism. This pattern of elevations is usually obtained by persons who report fatigue, a variety of somatic symptoms, low general efficiency, and memory problems. It suggests strongly that [appellant] is experiencing chronic anxiety around his awareness of some loss of mental efficiency, and this generalized anxiety is producing a substantial functional overlay to his organic pathology."
>
> * * *
>
> "In addition, he is a candidate for chemotherapy to reduce his generalized emotional distress over his loss of mental efficiency. The specific cognitive deficits shown on this testing might be explained to him as an aftereffect of his head injury, to reassure him that they are not symptoms of psychosis, etc., and that practice in memory skills is likely to gradually improve his efficiency."

In a letter dated June 25, 1985 the Office requested that appellant submit further medical and factual information, including a description of his duties upon his return to work following his June 1, 1984 injury, a description of his physical condition from June 1, 1984 to the present, any other illnesses or injuries occurring during this period, and an explanation of why appellant believed his current condition was related to his original injury.

In a July 17, 1985 letter, the Office advised appellant that the medical evidence in his case was insufficient and reminded him that the burden of obtaining medical evidence was upon him. No further evidence was received.

By compensation order dated September 17, 1985, the Office of Workers' Compensation Programs rejected appellant's claim.[2]

Appellant requested reconsideration of the September 17, 1985 order. In support of this request appellant submitted copies of a Champus-501 form with fee charges, Dr. Parker's September 3, 1985 attending physician's statement with charges, and an itemization of services rendered by Dr. Parker from March, 1982 through December, 1985.

By compensation ,order dated January 13, 1987 the Office reviewed appellant's case on its merits and denied modification of the prior order finding the evidence submitted insufficient to warrant modification of the prior order.

The Board finds that appellant has failed to establish that he has any disability subsequent to June 29, 1984, causally related to his June 1, 1984 employment injury.

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that his condition was caused or adversely affected by his employment. As part of this burden he must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relation. The mere fact that a disease manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two. Neither the fact that the disease became apparent during a period of employment, nor the belief of appellant that the disease was caused or aggravated by employment conditions, is sufficient to establish causal relation.[3]

In the present case appellant sustained an injury on June 1, 1984; he was treated at the IHS clinic for right trapezius strain and discharged. He returned to work on June 6, 1984 and was released from clinic treatment to full duty on June 11, 1984. Appellant also saw Dr. Parker several times subsequent to his initial IHS treatment for a variety of complaints related to both appellant's June 1, 1984 employment injury and to other preexisting conditions. Dr. Parker released appellant from treatment for complaints related to the June 1, 1984 injury to return to work on June 29, 1984.

The Office accepted appellant's disability claim for right trapezius sprain which resolved on June 29, 1984. Dr. Parker's last attending physician's report addressing the accepted employment injury was made on August 11, 1984, and thereafter appellant's record is devoid of any substantial evidence to support his disability after June 29, 1984 due to his June 1, 1984 injury.

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[2] The Board notes that the September 17, 1985 compensation order contains a typographical error which stated that appellant's disability was causally related to his June 1, 1984 injury.

[3] *See Bruce E. Martin*, 35 ECAB 1090 (1984); *Daniel R. Hickman*, 34 ECAB 1220 (1983); *Clifford Eaton*, 34 ECAB 1350 (1983).

On January 12, 1985 Dr. Parker completed another attending physician's report focusing on appellant's cardiovascular health status. No notation of any disability related to appellant's June 1, 1984 employment injury was made. In a March 13, 1985 disability retirement examination, Dr. Parker noted that appellant was disabled because of ASHD (arteriosclerotic heart disease) and HBP (high blood pressure). No diagnosis relating to appellant's accepted right trapezius sprain was made nor were the diagnosed conditions related to appellant's June 1, 1984 injury.

Subsequently, Dr. Parker opined that appellant seemed to be forgetful but that "this was nothing new since his coronary occlusion in 1981," and he commented that it was conceivable appellant's whiplash injury could interfere, through myositis and tension, with blood flow to appellant's brain when his head was in certain positions. No further analysis of causal relationship with appellant's June 1, 1984 employment injury was provided and no additional support for Dr. Parker's speculations was documented. Because Dr. Parker's opinion on causal relationship is speculative and without supporting documentation, and because his statements lack rationalized medical analysis supporting a causal relationship, they are of diminished probative value in supporting a causal relationship between his present disability and the accepted employment injury.

Appellant saw an IHS physician in March and April 1985 for completion of CA-16 and retirement physical forms. The IHS physician diagnosed severe muscle sprain with cervical and thoracic spine spasms which she related to his June 1, 1984 employment injury, but she failed to provide any rationalized medical opinion supporting the relationship, and she failed to explain how symptoms which had resolved in July 1984 had recurred in April 1985. Because the statements of the IHS physician lack any rationalized medical opinion or supporting documentation, they are of little value in proving a causal relationship between appellant's June 1984 employment injury and his April 1985 disability.

Dr. Haines saw appellant in April 1985, opined that it was possible he had residuals of a cervical strain and may have underlying cervical spondylosis which was producing his pain and discomfort, and noted that it was not unlikely that appellant had some ongoing cerebrovascular insufficiently contributing to his problems. In May 1985 Dr. Haines noted that appellant had a normal CAT scan of the head and had some degenerative changes indicating spondylosis at C5-6, primarily anterior to the interspace, and some narrowing, but opined that these changes would not *per se* explain the severity of appellant's continued headaches and alleged changes in mentation. No causal relationship with appellant's June 1, 1984 employment injury was documented or supported with a rationalized medical opinion. Therefore, Dr. Haines diagnosis of possible cervical strain residuals is speculative and of little probative value in proving a causal relationship between appellant's disability and his June 1, 1984 employment injury which was diagnosed and accepted as right trapezius sprain.

Dr. Sherrill, a psychologist, saw appellant in May 1985, reviewed his history and current complaints, and administered a battery of neuropsychometric tests. After analyzing the test results Dr. Sherrill opined that the results were highly unusual unless there had been some peripheral or cortical lateralized damage, particularly some dysfunction in the posterior portions of the cortex. The doctor noted that appellant was a candidate for chemotherapy to reduce his generalized emotional distress over his loss of mental efficiency. Dr. Sherrill noted that the specific cognitive deficits show on testing could be explained to appellant as an aftereffect of his head injury to reassure him that they were not symptoms of psychosis. Dr. Sherrill did not make specific findings implicating appellant's June 1, 1984 employment injury as the cause of appellant's cortical deficits or dysfunction, and he did not provide a rationalized medical opinion on how the specific injuries sustained in the accident led to the changes in mentation appellant has alleged. Additionally Dr. Sherrill's opinion was speculative on the nature and extent of appellant's present disability, and he failed to articulate what portion of the measured deficits were due to appellant's history of myocardial infarction and continuing cardiovascular and cerebrovascular insufficiency. Because Dr. Sherrill's opinions lack rationalized medical analyses on the causal relationship between appellant's disability and his June 1, 1984 employment injury, and because they are speculative and unsupported by documentation of the actual nature and extent of appellant's disability, they are not sufficient to prove that appellant's disability after July 29, 1984 was causally related to his June 1, 1984 employment injury.

Because none of appellant's examining or treating physicians provided a complete factual health history of appellant or of his present disability, and because their opinions were speculative and lacking rationalized medical opinions causally relating appellant's disability to injuries sustained in the June 1, 1984 accident and his accepted condition of right trapezius sprain, the medical evidence presented is insufficient to establish a causal relationship with the employment injury[4] and instead links appellant's present disability to preexisting nonoccupational pathologies. For this reason appellant has failed to establish that he had a disability subsequent to June 19, 1984 causally related to his June 1, 1984 employment injuries.

The January 13, 1987 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Michael J. Walsh, Chairman, dissenting:

The appellant in this case was involved in a rear-end collision June 1, 1984. Contemporaneous medical data revealed typical reactions from a diagnosed "whiplash" injury—pain in the neck, hand, and shoulder. However, the emergency medical unit noted pupils were equal in size but the left was minimally reactive to light. The appellant was treated with a cervical collar. Early on, a physical therapy report noted complaint of pain in the right occipital region. By June 11, 1984, Dr. Long, the treating physician, released appellant for regular duty.

In March 1985 appellant's supervisor noted, among other things, the appellant was unable to perform his job in several particulars and ". . . [had] a tendency in misplacing his tools and not completing work assigned him due to memory."

In April 1985 his treating physician, Dr. Floyd C. Parker, explained his patient's forgetfulness in this manner:

> "He does seem to be forgetful but this is nothing new since his coronary and is not due to anything on his medication. [Appellant] did suffer a moderate concussion, he did suffer [a] whiplash injury but that is the extent of it. If it is necessary I will be glad to have brain scan performed with contrast media to rule out any atrophia or any brain damage from the whiplash injury. I believe [appellant's] function is alright, he may get a little dizzy looking up and not be able to see well. (This might be due to his age and his atherosclerosis of the generalized arterial system of his body which maybe causing a decreased blood flow in looking up. It is also conceivably possible that a whiplash injury would antagonize blood flow to his brain through myositis and tension and therefore further reduce blood flow to his head in certain positions.)"

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[4] *See Rosa Lee Jones*, 36 ECAB 679 (1985).

Dr. Parker treated the appellant all through 1984, seeing him on five occasions, and four more times through April 1985. At this point, a Clinic Report, disclosed two diagnoses, "concussion" and "whiplash," and that appellant complained of being forgetful.

In late April 1985 appellant was seen by Dr. Lynn Haines, a neurosurgeon, who recounted this history:

> ". . . [Appellant has] a history of interscapular and bilateral shoulder pain, suboccipital and generalized headaches and definite changes in mentation and mental status, allegedly of onset, following an on-job injury which occurred on June 1st, 1984. [He] was . . . injured in a two truck motor vehicle accident, in which his smaller pickup was struck from behind by a much larger vehicle. . . . *He apparently, was thrown backwards with enough force to break out the back window with his head and then was thrown forward against the steering wheel of his vehicle.* [Appellant] has no good recall of the accident. Most of the details have been provided by other individuals and it would appear, therefore, that he had a concussion or contusion, in addition to the flexion/extension injury of the neck. . . ." (emphasis added)

The doctor opined a number of theories to account for headaches and memory loss. He felt appellant might have a residual of severe strain, which could account for his headaches, that he had symptoms compatible with dementia or organic mental syndrome, or chronic subdural hematoma, post-traumatic seizure disorder or diffuse cerebral atrophy due to vascular insufficiency, or spondylosis in the neck to such an extent there was vascular compromise.

Dr. Haines took tests which he reported on May 1, 1985 but felt they did not explain the "severity of his headaches and changes in mentation. . . ."

He felt it was necessary to complete a psychometric battery and arranged to have appellant see Dr. Roberts Sherrill, Jr., a psychologist. After reciting the facts of the accident and immediate repercussions the doctor states:

> "He reported almost constant headaches now, which he said were made worse by physical or mental exertion. . . . He described continuing generalizing difficulties with memory. . . . As the result of his current difficulties maintaining spatial orientation, he now has to have someone with him when he drives, in order to cue him concretely which way to return, remind him of approaching red lights, etc. He remarked that

> he had driven through several red lights since his accident, which is why his wife or other relatives always accompany him now. He admitted to a variety of emotional disturbances since his accident, including generalized anxiety and depression and increased irritability. . . ."

After neuropsychological testing the doctor found two specific areas of deficit: sustained attention and impaired strength in his right hand compared to his left. He found that results such as these ". . . are highly unusual unless there has been some peripheral or cortical lateralized damage." He concluded:

> "The discrepancy between his deficits on the task of complex tactile problem-solving, as compared to his relatively good scores on other skills of problem solving, suggest that there is more dysfunction in the posterior portions of the cortex."

Of importance is the fact, the subject in taking the tests, in the opinion of Dr. Sherrill, did not try to skew his answer toward "looking good" or looking bad."

I find the case is not in posture for decision.

Proceedings under the Act are not adversarial in nature nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation the Office shares the responsibility in the development of the evidence. It has the obligation to see justice is done.[1]

Initially this accident appeared to the doctors to be a simple "whiplash" injury. In view of later occurrences such as, appellant's complaints of headaches, loss of memory, neck pain and inability to perform at work because of forgetfulness coupled with the fact his head hit the back window hard enough to knock it out and the findings of Dr. Haines, a neurosurgeon who noted chronic headaches and definite changes in appellant's mentation and opined a number of theories as to cause, and Dr. Sherrill who theorized it could be due to the employment head injury, there is enough in the record to further develop this case. No Office medical adviser's evaluation of the medical evidence was obtained and no contradictory medical opinions were produced.

Although the reports of Drs. Haines and Sherrill are not sufficient to meet appellant's burden of proof, they are sufficient to require further development on the issue of causal relationship, if any, between appellant's headaches and changes in mentation and his June 1, 1984 employment injury.[2]

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[1] *Russell F. Polhemus*, 32 ECAB 1066, 1069 (1981).

I would set aside the September 17, 1985 and June 31, 1987 decisions of the Office of Workers' Compensation Program and remand the case for further development including preparing a statement of accepted facts and referral of appellant, along with an interpreter to a Board-certified specialist for a reasoned opinion on whether appellant's headaches and changes of mentation after June 29, 1984 are the result of his June 1, 1984 employment injury.

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[2] *See Horace Langhorne*, 29 ECAB 820 (1978).

In the Matter of PAUL S. DEVLIN *and* U.S. POSTAL SERVICE, POST OFFICE, Canton, Mass.

Docket No. 88-88; Submitted on the Record;
Issued April 12, 1988

Before MICHAEL J. WALSH, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether appellant's claim for an emotional condition is barred by the applicable time limitation provisions of the Federal Employees' Compensation Act.

On June 4, 1986 appellant, then a 36-year-old clerk, filed a traumatic injury claim alleging that he sustained an emotional condition causally related to a head injury at work in October 1980. Appellant described the injury as occurring when he opened the door to the men's room and it jammed, causing him to hit his head on the door. He explained his delay in filing a claim was because at the time of injury he did not realize how serious it was. Appellant noted that he was admitted to the hospital about one month later and has been "in and out of hospitals and under doctors' care ever since." Appellant claimed compensation as a result of wage loss from October 1980 through the present.

The employing establishment noted that it had no knowledge of or information about the alleged incident, and that appellant did not lose any time from work related to his alleged injury. The employing establishment also noted that appellant had filed a claim for an unrelated traumatic injury sustained on September 1, 1983 and that therefore appellant was aware of the proper procedures to follow in the event a traumatic injury was sustained on duty.

In support of his claim appellant submitted numerous medical records dating from November 29, 1980 to the present. A hospital discharge summary from Dr. Stephen M. Jaffe, a Board-certified psychiatrist, noted that appellant had been admitted on November 29, 1980 to the psychiatric unit with complaints of increased pressure in his head, weight loss, decreased appetite, feelings of depression, increased fatigue, and trouble at work. Results of physical examinations and laboratory studies were all noted as being normal. Appellant was treated with tranquilizers and discharged on December 27, 1980 with a diagnosis of "impulsive character disorder and latent psychosis."

An April 23, 1985 report from Dr. Jaffe noted that "[appellant] is under my care for an acute exacerbation of a panic disorder and will be unable to work at this time."

A May 7, 1985 report from Dr. Richard C. Raymond, a psychologist, noted that appellant had first contacted his office on September 11, 1984 complaining of anxiety and of recent events at work. Dr. Raymond noted that appellant revealed insomnia, anxiety, excessive work stress, and a panic disorder presently under control with drug therapy supervised by Dr. Jaffe. Dr. Raymond instituted behavior therapy in 1984 and noted that during subsequent therapy sessions the possibility of a manic-depressive disorder became apparent because of sustained periods of flight of ideas, hyperactivity, and grandiose thinking.

A hospital admission note dated May 9, 1985 by Dr. Michael Engel, a psychiatrist, stated that appellant had been seen in outpatient psychotherapy for three years while maintained on medication for panic symptoms, and that for three weeks prior to this admission appellant had felt that the medication was "poisoning his body." Dr. Engel noted that "[appellant's] first decompensation occurred in 1980 at which time he was hospitalized. . . . [He] denies a history of psychiatric treatment prior to that time [but] . . . states that he has felt that his mood has always been somewhat labile and that he had experienced episodes of racing thoughts and feeling pressured since adolescence. These symptoms were not previously treated." Dr. Engel noted that appellant's father "suffers from manic depressive symptoms as well," and noted that his father and two of his brothers suffer "severe mood swings" but have never had psychiatric treatment. Dr. Engel noted as follows:

> "[Appellant] relates numerous issues about work which he finds stressful. He describes that since last August, he has felt that his bosses and supervisors at work have been out to dis-

> credit and harass him. It is unclear whether this belief is based in reality or represents delusional thinking. [He] describes the situation as nearly comprising a conspiracy against him. . . . Speech is pressured and somewhat loud. There is psychomotor agitation and restlessness. . . . [He] appears somewhat distractable. . . . Affect appears anxious and expansive. Thought processes are grandiose with flight of ideas and possible paranoid ideation or perhaps delusions regarding events at work over the past several months."

Physical examination results were normal with intact cranial nerves, and a normal sensory motor examination. Dr. Engel diagnosed a bipolar, manic disorder with a possible related panic disorder.

A summary of appellant's June 21, 1985 hospital discharge by Dr. Stephen Kerzner, a Board-certified psychiatrist, noted a diagnosis of mixed bipolar disorder, somatization disorder, schizotypal personality disorder, and possible maculopathy, and noted as follows:

> "An apparent precipitant for [appellant's] decompensation involved his conflict with the employing establishment over his job status. [He] claimed that he had been harassed at work and that his supervisors have attempted to discredit him because of his history of psychiatric care, as well as their concerns about his possessing guns and a poster of a mass murderer in California. . . . [Appellant] reported that his supervisor at work contacted the . . . police . . . about his guns, and his guns were ultimately confiscated by the police because the patient had allegedly concealed his psychiatric history. [Appellant] claimed that he believed that his psychiatric treatment had been for strictly physical complaints and did not consider this to be of a psychiatric nature."
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> * * *
>
> "A neurology consultation was obtained because of [appellant's] numerous somatic complaints. . . .
>
> "Dr. Corwin, the neurologist, . . . did suggest a sleep-deprived EEG (electroencephalogram) to rule out the possibility of a temporal lobe epilepsy in view of [appellant's] history of hypergraphia and his atypical clinical course and mental state. Dr. Corwin also suggested that [appellant's] pressure in his head was a psychogenic complaint without physical basis. His

> sleep-deprived EEG revealed focal irregular theta slowing over the left mid-temporal derivations accentuated with hyperventilation. This focal left temporal slow wave abnormality was suggestive of the presence of a structural left temporal abnormality requiring clinical corrolation. . . . At Dr. Corwin's suggestion, a repeat routine EEG was obtained which revealed fluctuating bi-temporal theta activity which Dr. Corwin felt was nonspecific. However, a CT scan with contrast was also obtained to rule out a focal left temporal abnormality, and this proved entirely normal . . . . An internal medicine consultation was also obtained because of [appellant's] multiple somatic complaints, and the internist, Dr. Bowman reported that there was no organic basis for any of [his] multiple somatic complaints based on history and physical examination and laboratory studies.
>
> "[Appellant] continues to report multiple somatic complaints, including fatigue, blurred vision, stomach bloating and tremor, restlessness, pressure in his head and burning in his feet. He also reports motor restlessness.
>
> "[Appellant] feels unable to return to work at this time because of his conviction that there is a conspiracy against him at the [employing establishment] where he has worked. . . . It is felt that [he] would have difficulty tolerating the pressure of his job in view of his continuing dysphoria, agitation and somatic preoccupations. However, it is hoped that [he] can get back to work in the near future and he has been referred . . . for vocational rehabilitation."

A June 28, 1985 report from Dr. Jaffe to the employing establishment noted that appellant had been in treatment with him since 1980, that in April 1985 his panic attacks exacerbated to the point that he was hospitalized on May 8, and that he had been unable to work since April 25, 1985 and remained incapable of working.

A July 17, 1985 hospital admission note from Dr. Mack Robbins, a psychiatrist, noted that appellant had decided four days prior to admission to stop all his medication because he felt it was not doing him any good. Dr. Robbins noted as follows:

> "[Appellant's] thought processes are coherent, but he is extremely focused on somatic complaints and sometimes will change the subject suddenly, back to his various somatic complaints. His complaints are sometimes vividly described and sometimes sound like somatic delusions, as he sometimes

> seems almost convinced that his blood vessels are indeed constricted and choking his body off of all oxygen."

A June 23, 1985 report from Nancy Ricks, Ed.D., who performed testing on appellant for further assessment of possible organic impairment, learning disabilities, and attention deficits, noted as follows:

> "[Appellant] related in a ruminatory and tangential way, a story about having a great deal of difficulty at work: 'There's a lot of trouble there. They're saying things about me, harassing me, trying to get rid of me. The supervisors don't know how to supervise. I have a license to carry a gun. A couple of employees felt threatened.' "

* * *

> "[Appellant] indicated that he graduated from high school in 1967 where he was a 'C' student. He thought he had been kept back one year, but was unable to say which year of school that was. He has three brothers and two sisters, but indicates that he does not know much about them. He said that his sisters had run away. He could provide no history of childhood medical illnesses or *head trauma*. (Emphasis added). He did say that he had a spot on his eye when a brother had thrown a piece of ice at him. He reports no frank seizures but indicates that he has had fainting spells. His major problem, he felt, was that he was just worn out and could not concentrate and related this to what had happened to him at work.
>
> "Attempts to elicit a more detailed educational history were largely unproductive. He has a kind of vague recall of school, but could not indicate favorite subjects or areas in which he was having difficulty; there was a flavor of a memory difficulty for remote events. . . . [Appellant's] motor speed was markedly slow throughout testing."

Ms. Ricks administered a variety of psychometric tests and noted as follows:

> "[Appellant's] overall level of intellectual functioning is at the lower end of the low average range (Full Scale IQ equals 83). There is not a significant discrepancy between his functioning on verbal tasks (Verbal IQ equals 82) and his functioning on visuospatial tasks (Performance IQ equals 84). Most striking,

> given that he presumably had this task within the last two or three months, was that he reacted to test items with a few exceptions as if he had never seen them or heard the questions before. This is very unusual, except in people who have memory problems and marked difficulty in learning. [H]is most adequate performances were on some visuospatial and visual planning tasks, and the strategies that he employed are those seen in individuals with more severe left hemisphere impairment.
>
> "These results are consistent with a generalized organic process of long duration, such as one might see with early (birth to three years) hypoxia. There are also indications of more severe left hemisphere involvement and particularly in the area of the temporal lobe more anteriorly and into the frontal lobe on the left. His greatest deficit is in his verbal memory and learning of new material. There is fairly diffuse, mild impairment of his language functioning I do not think can be attributed in its entirety to depression. Quality of his thinking is reminiscent of people with left temporal lobe impairment. Further, I would suspect more impairment of deep temporal lobe and frontal lobe structures rather than those on the surface."

A July 26, 1985 discharge summary by Dr. Luis T. Sanchez, a Board-certified psychiatrist, offered a diagnosis of organic affective syndrome and noted as follows:

> "A definitive diagnosis appeared to be unclear despite review of his previous hospitalizations and discussion with his psychiatrist, Dr. Jaffe. In order to more objectively assess the differential diagnosis, neuropsychological testing was requested. . . . The overall results were consistent with a generalized organic process of longstanding, possibly since childhood. There was evidence of more severe left hemisphere involvement, particularly in the temporal lobe and frontal lobe areas. His greatest deficit was in verbal memory and learning of new material. There was diffuse mild impairment of language functioning. . . . [I]t was my assessment that he had cognitive impairment of unclear etiology. This impairment significantly compromises his ability to work."

An October 8, 1985 report from Dr. Sanchez with respect to disability retirement noted that neuropsychological testing results were "consistent with a generalized organic process with more severe left hemisphere involvement than the right, particularly in the temporal lobe and frontal lobe areas. . . . Dr. Ricks felt that his low average intelligence combined with his cognitive deficits made him more vulnerable to stress and, ultimately, depression." Dr. Sanchez diagnosed "Organic affective syndrome with features of anxiety, depression, and paranoia" and opined that "full or partial recovery is not expected in the near future in that his present disorder appears to be secondary to a cognitive impairment of longstanding."

A January 23, 1986 report from Dr. Jaffe noted appellant had been his patient for five years and had initially presented with symptoms of "burning feet" and depression. He stated as follows:

> "About one year ago, [appellant] started to believe that the people [at work], especially his boss were out to get him. There may be some reality to this as a new [supervisor] was appointed and he was 'cleaning shop.' [Appellant] has always been somewhat socially distant and his area of safety was threatened.
>
> "From this point on [appellant's] belief accelerated until he was totally preoccupied with this assault on his character. Psychiatric hospitalization ensued. . . . He remains unable to work, cannot concentrate, is completely preoccupied with body symptoms and has almost delusional ideas about what is happening to his body.
>
> "Diagnostically, . . . it is most likely he has an atypical form of paranoid schizophrenia."

However, a May 9, 1986 report from Dr. Leonard R. Friedman, a Board-certified psychiatrist, noted as follows:

> "[Appellant] in 1980, reports a head injury at work, walking into a metal door. He soon after started developing panic-like feelings and was hospitalized. . . . He continued under psychiatric care for anxiety and depression. It was not until 1985 that EEG's were done with a diagnosis of Temporal Lobe Epilepsy made. Psychological tests showed organic damage and a diagnosis of a Schizoaffective Disorder. In that his head injury at work caused emotional changes, he remained under psychiatric care but was able to work effectively through 1983 in familiar surroundings. With new supervisors . . . [his] behavior led to a series of warnings and fitness for duty examinations,

> which he interpreted as harassment. However, in 1984, he was reported by his supervisor to the police and his gun permit was taken away that day. With the intrusion into his home life [appellant] became more anxious and depressed. His symptoms became worse and due to the continued pressures at work and the misstatements in the police report, he could no longer function effectively. Finally, in 1985, he signed into a psychiatric hospital where a diagnosis of his Temporal Lobe Disorder and Schizoaffective disorder was made.
>
> "In my opinion, due to his head injury at work without any preexisting illness, [appellant] developed panic symptoms, anxiety and depression. After 1983, when significantly stressed by events, specifically August 8, 1984, he became unable to cope with others, feeling severely maligned by accusations of suicidal ideas, having pictures of mass murderers and his having guns. The temporal lobe injured patient needs a significant support system which when taken away, leads to more serious psychiatric sequelae."

A CA-20 attending physician's report dated June 5, 1986 by Dr. Friedman gave a history of "head injury in October 1980 leading to personality changes. Panic attacks followed"; he noted that "EEG findings of temporal lobe disorder . . . account for symptomatology since 1980" and diagnosed a moderately severe schizoaffective disorder with disorder with temporal lobe epilepsy.

By letter dated June 24, 1986 the Office of Workers' Compensation Programs advised appellant of the requirements of 5 U.S.C. section 8122 and requested that he provide evidence of his immediate supervisor's knowledge within 30 days after the occurrence or of any applicable exceptional circumstances causing his failure to file a claim within three years after the incident. The Office also requested further medical evidence and information about the incident. Nothing further was received.

By compensation order dated July 25, 1986 the Office rejected appellant's claim finding that appellant had failed to meet his burden of proof.

On July 24, 1986 the Office received a letter dated July 21, 1986 from appellant's attorney requesting that the three-year time limitation requirement be waived because of exceptional circumstances. The circumstances noted were that it was not until the spring of 1986 when appellant was questioned by Dr. Friedman about his having had any head injuries, that "anyone in the medical profession made a causal connection between this injury and his medical problems since 1980."

Also enclosed were copies of hospital records from 1980.

A medical consult request dated December 2, 1980 from Dr. Jaffe noted appellant's history as "[a] 24-pound weight loss [during] *past year.* (Emphasis added) Agitated with fear of loss of contact. Decreased appetite. Multiple somatic complaints." Dr. White, an internist, attributed appellant's 24-pound weight loss to dental and emotional problems, noting that he had undergone a tooth extraction in June 1980. Dr. White also noted that appellant's headaches were bi-temporal.

Physician's progress notes written during appellant's November 29 to December 27, 1980 hospitalization by Dr. Jaffe recorded the following:

> "[Appellant's] 1977 weight [was] 156. Last year [he] went from 150 to 126 loss of 24 pounds. Weight varies but not pass 131 mark.
>
> "Still has pressure in head. Weight 126. No appetite. A continuous pounding. Not as bad as with Dr. Liebermen. Not take any meds for 2 days-10 mg Librium. Took 20 mg three times a day Librium—not make patient feel right. . . ."

Dr. Jaffe noted that appellant remarked:

> "Talked it over with boss about coming into hospital. Think I will like it here. They all have same problem that I have. Want to learn to talk to people without getting up tight."

Dr. Jaffe continued:

> "Dr. L. scared patient when he said [Librium] could be addictive. When stop Librium headaches came back and were worse. Did not take four a day that [he] was supposed to, afraid of addiction."

Dr. Jaffe noted that appellant volunteered:

> "As kid 15-16 years old used to see father—could tell he wasn't happy—he was a truck driver—guess he learned to cope with my mother—he is perfect father—saw father at VA in locked ward that still sticks in my mind. Mother was very nervous. . . . Maybe she was one to drive Father into hospital. Father—love now. He understands me. He seems to know be-

> cause he went through it. Father says has to learn to live with it. He tries to help me."

By report dated July 17, 1986 Dr. Jaffe noted that after he began treating appellant with Nardil, in November 1980 appellant responded well for "a number of years" and "was able to work a lot of overtime at his job." Dr. Jaffe's diagnosis at that time was undifferentiated schizophrenia.

Also received by the Office on July 24, 1986 was a July 14, 1986 report from Dr. Timothy P. Lowney, an osteopath, which noted that appellant had been under his care from March 1984 until April 1985 for multiple complaints including cough, burning feet, psoriasis of the ears, bronchitis, headaches, nervousness, anxiety, chest pains and tightness, inability to breathe, dizziness, weakness, and nightmares, but that during that entire period, appellant made no mention of having had a work-related injury. Dr. Lowney noted that vascular studies and CAT scan results during that period were all normal.

By letter dated July 28, 1986 appellant requested a hearing on the prior decision rejecting appellant's claim.

By compensation order dated November 24, 1986 the Office hearing representative vacated the prior decision which had determined that appellant had failed to meet his burden of proof, but the hearing representative found sufficient evidence regarding the issue of timeliness to require the Office to render a decision on that issue.

By compensation order dated January 13, 1987 the Office rejected appellant's claim finding that it was barred by the statutory time limitations under 5 U.S.C. section 8122.

By letter dated January 16, 1987 appellant requested a hearing on the issue of timeliness.

A hearing was held on May 14, 1987 and a deposition of Dr. Friedman was submitted; by decision dated and finalized July 2, 1987, the Office hearing representative found that appellant's claim was not timely filed within the statutory limits of 5 U.S.C. section 8122.

The Board finds that appellant's claim for an emotional condition causally related to an alleged October 1980 employment injury is barred by the applicable time limitation provisions of the Federal Employees' Compensation Act.

Section 8122 of the Federal Employees' Compensation Act[1] states that:

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[1] *See* 5 U.S.C. section 8122 (as amended, 1974).

> "(a) An original claim for compensation for disability or death must be filed within 3 years after the injury or death . . . unless (1) the immediate superior had actual knowledge of the injury within 30 days."
>
> * * *
>
> "(b) In a case of latent disability, the time for filing a claim does not begin to run until the employee has a compensable disability and is aware, or by the exercise of reasonable diligence should have been aware of the causal relationship of the compensable disability to his employment."[2]
>
> * * *
>
> "(d) The time limitations in subsections (a) and (b) of this section do not—
>
> * * *
>
> > "(2) run against an incompetent individual while he is incompetent and has no duly appointed legal representative; or
> >
> > "(3) run against any individual whose failure to comply is excused by the Secretary on the ground that such notice could not be given because of exceptional circumstances."

The Board notes that the term latent disability generally refers to an injury or disability of insidious onset, such as an occupational disease or condition produced by systemic infections, continued or repeated stress or strain, exposure to toxic chemicals, fumes or poisons, or other continued or repeated exposure to conditions of the work environment which produce a cumulative or increasingly deleterious effect upon the employee, of which the employee may not be immediately aware. In the present case appellant's alleged injury involved a traumatic incident of which he was immediately aware, even though all of the sequelae of that injury may not have been known to him until later. Therefore, the time for giving notice of injury and for filing a claim for compensation began to run at the time of the traumatic incident, despite the claim that he was not aware of the seriousness or of the ultimate consequences of the injury, or that the nature of the injury was not diagnosed until sometime later.[3] Since appellant did not file a claim until June 1986, it was not timely filed within the three-year period of limitations.

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[2] 5. U.S.C. section 8122(b); *see* 20 C.F.R. section 10.105(c). ("In a case of latent disability, or death due to a latent disability, the time for filing a claim does not begin to run until the employee has a compensable disability, or death, and is aware or his surviors are aware or by the exercise of reasonable diligence should have been aware of the causal relationship of the compensable disability or death to the employment.") *See Anna M. Hooper (Francis Hooper)*, 37 ECAB 495 (1986); *Thelma Sykes (Okey Sykes)*, Docket No. 86-607 (issued March 26, 1986).

There is no evidence in the case record that appellant's immediate supervisor had actual knowledge of the injury within 30 days. Thus, appellant's claim can be considered timely filed only if the three-year time limitation can be excused because of mental incompetency or exceptional circumstances.

With regard to the question of whether the time limitations should not begin to run from the date of injury because appellant was incompetent, the Board notes that this question is primarily a medical one. It is appellant's burden to show that he was incompetent for the period since time began to run by submitting medical evidence stating that his mental condition was such that he was not "capable of filling out a form or of otherwise furnishing the relatively simple information necessary for filing a claim and satisfying the limitation requirements."[4]

The medical evidence in the case record shows that appellant was hospitalized for his psychiatric condition from November 29 to December 27, 1980, from May 8 to June 24, 1985, and from July 16 to July 26, 1985. Appellant's mental condition during these hospitalizations may or may not have excused him from filling out the requisite compensation forms; however, there is no such similar evidence for the other periods of time between October 1980 and June 1986, an elapsed time of almost six years. Additionally, appellant was gainfully employed during most of this period, was able to work a lot of overtime at his job, receive and cash paychecks, and carry on most normal activities of daily living.

The Board finds that appellant has not shown that he was mentally incompetent during the entire period and thus the time limitations do not toll.[5]

The decision of the Office of Workers' Compensation Programs hearing representative dated July 2, 1987 is hereby affirmed.

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[3] *See Eugenia A. Collins,* 30 ECAB 108 (1978); *Emma L. Pagitt,* 30 ECAB 210 (1978); *Harold B. Thomas,* 30 ECAB 526 (1979); *Mary S. Grimes,* 29 ECAB 123 (1977); *Santino J. Pipitone,* 28 ECAB 613 (1977); *Rupert H. Kinard,* 28 ECAB 256 (1977).

[4] *Mildred B. Dichter,* Docket No. 84-945; (issued July 14, 1986).

[5] Appellant has also not shown that he is entitled to have the time limitations toll due to "exceptional circumstances." For instance, an "exceptional circumstance" recognized by the Secretary of Labor is where an employee is a prisoner of war. Appellant has not shown that he was under that type of circumstance.

In the Matter of ESTHER GREEN *and* VETERANS ADMINISTRATION, VETERANS ADMINISTRATION HOSPITAL, Syracuse, N.Y.

Docket No. 88-404; Submitted on the Record; Issued April 12, 1988

Before MICHAEL J. WALSH, DAVID S. GERSON, MICHELE VON KELSCH

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant was not without fault in the creation of an overpayment of compensation in the amount of $5,506.81 and that therefore the overpayment was not subject to waiver; and (2) whether the Office properly determined that $62.00 would be withheld from appellant's continuing compensation benefits every 28 days.

On December 20, 1963 appellant, then a 45-year-old food service worker, filed a claim for a traumatic injury to her back sustained on November 13, 1963 while lifting cup racks in her federal employment. Appellant stopped work on the date of injury. Appellant sought medical treatment complaining of low back pain and was diagnosed as having sustained a herniated lumbar disc at the L5-S1 level which was accepted as employment related by the Office on July 16, 1986.

Appellant received compensation benefits for wage loss for the period January 12, 1964 through May 3, 1964 and again commencing August 2, 1964. Effective June 9, 1966 appellant's compensation benefits were reduced as it was determined that she was no longer totally disabled, but was capable of performing some light-duty work and was entitled to compensation based upon a partial loss of wage-earning capacity.

By letter dated May 2, 1986 the Office informed appellant that a preliminary determination had been made that an overpayment of compensation in the amount of $5,506.81 had occurred in her case. The Office stated that appellant had erroneously been paid compensation for temporary total disability instead of loss of wage-earning capacity for the period June 19, 1981 to September 29, 1984, thereby resulting in an overpayment. The Office stated that a preliminary finding had been made finding appellant at fault in the creation of the overpayment since she should have been aware that she was not entitled to the increased checks for temporary total disability. By memorandum to the file dated May 2, 1986 the Office noted that the error in benefits paid to appellant was due to the Office's transfer from a manual to a computerized system in June of 1981.

The record reveals that the Office found appellant capable of earning $50.00 per week in 1966 and reduced her compensation benefits accordingly. Appellant's current pay rate for the job she held at the time of her injury was $78.00 per week; therefore, appellant had an earning capacity of 63 percent and was entitled to compensation benefits based upon a loss of wage-earning capacity of 37 percent.

The record revealed that appellant began receiving checks in the amount of $258.96 on June 18, 1981, whereas previously appellant's checks had been in the amount of $164.96. Based upon appellant's wage-earning capacity appellant was entitled to compensation, effective June 18, 1981, at the rate of $54.75 per week; thus for the period June 18, 1981 through February 28, 1982 she was entitled to compensation in the amount of $2,002.29. Because of a consumer price index increase (CPI), appellant was entitled to compensation at the rate of $59.50 per week for the 365 calendar days from March 1, 1982 to February 28, 1983, a total entitlement of $3,102.50. Because of another CPI, appellant was entitled to compensation at the rate of $61.75 per week during the 366 days from March 1, 1983 through February 29, 1984, for a total entitlement of $3,228.64. Another CPI became effective March 1, 1984 and appellant was entitled to compensation from that date through September 29, 1984, a total of 213 calendar days, at the rate of $63.75 per week, for a total entitlement of $1,939.82. Therefore, appellant was entitled to $10,273.25 in compensation benefits from June 18, 1981 through September 29, 1984. The records indicate that appellant was actually paid compensation, during that period, in the amount of $15,780.06. Thus, the claimant was overpaid compensation in the amount of $5,506.81. This overpayment was the result of computer error which paid appellant compensation for total temporary disability instead of loss of wage-earning capacity for the period June 19, 1981 through September 29, 1984.

By letter dated May 29, 1986 appellant requested a hearing before an Office hearing representative. She also submitted an overpayment recovery questionnaire which listed her monthly income but which did not explain why she believed she was without fault in the creation of her overpayment.

A hearing was held on June 22, 1987 in which appellant testified that her monthly expenses exceeded her monthly income. Appellant stated that she thought any increase in her compensation benefits was due to cost-of-living increases she periodically received. Appellant stated that she did not notice anything particularly different or that "caught her attention" in 1981 when she started to receive checks at a higher rate.

By hearing representative decision dated September 11, 1987 and finalized that same day, the Office found that there was an overpayment of $5,506.81 in appellant's case and that appellant was not without fault in its creation. The Office held that appellant must repay the debt in the amount of $5,497.82 plus all future accrued interest. The Office used the minimum rate allowable under their procedures and policies and found that the overpayment must be recovered by deducting $62.00 every 28 days from appellant's continuing compensation benefits.[1]

The Board finds that the Office of Workers' Compensation Programs properly determined that appellant was not without fault in the creation of an overpayment of compensation in the amount of $5,506.81 and that therefore the overpayment was not subject to waiver and had to be recovered.

The Federal Employees' Compensation Act, 5 U.S.C. section 8129(b) states that "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience." Conversely, no waiver of overpayment is possible if the claimant is with fault in helping to create the overpayment.[2]

In determining whether an individual is "without fault," what constitutes "fault" depends on whether the facts show that incorrect payment resulted from:

> "(a) An incorrect statement made by the payee which the payee knew or should have known to be incorrect; (b) Failure of the payee to furnish information which the payee knew or should have known to be material; or (c) Acceptance of a payment which the payee either knew or should have been expected to know was incorrect." [3]

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[1] FECA Bulletin No. 87-19.

[2] *Mary Valentine*, 33 ECAB 1419 (1982).

[3] Pursuant to *Califano v. Yamasaki*, 422 U. S. 682, 99 S. Ct. 2545, the Office established procedures to be followed in handling overpayment of compensation cases. These procedures are detailed in the Federal (FECA) Procedure Manual, Chapter 2-901, Overpayments. *See Wanda C. Brown*, 33 ECAB 1133 (1982).

In the present case, the Office applied the third standard—acceptance of a payment which the payee either knew or should have been expected to know was incorrect—in finding appellant at fault in creating the overpayment.

The Board finds that the facts of this case establish that appellant should have known or been expected to know that she had accepted a payment that was incorrect.

Because of an error by the Office in transferring from a manual system to computer system, appellant was paid compensation from June 18, 1981 to September 29, 1984 based on temporary total disability compensation instead of partial disability compensation. Commencing June 18, 1981, appellant began receiving compensation checks in the amount of $258.96, whereas previously her checks had been in the amount of $164.96. The difference of $94.00 in the checks, an increase of greater than fifty percent, should reasonably have put appellant on notice that an error had been made. The increase in appellant's checks was so great that she should have known the payments were incorrect. Appellant has given no explanation for her belief that she was without fault in the creation of the overpayment in her case. Appellant argued that it would be against equity and good conscience to force her to repay the amount of the overpayment because the overpayment was due to Office error and because it would create a hardship on her already poor financial condition. The Board notes that appellant's argument that it would be against equity and good conscience to recover the overpayment is unpersuasive as the Act only provides for waiver of recovery if the individual is found without fault in the creation of the overpayment. As appellant was properly found not without fault with regard to the creation of the overpayment of compensation in the amount of $5,506.81, the overpayment is not subject to waiver.

The Board finds that the case is not in posture for decision with regard to the issue of whether the Office properly determined that $62.00 would be withheld from appellant's continuing compensation benefits every 28 days.

The Office determined that $62.00 would be the amount withheld from appellant's continuing compensation benefits every 28 days based upon FECA Bulletin 87-19 which states that in "all overpayment cases the minimum acceptable offset against continuing benefits will be ten percent of each scheduled payment; however, in no case will the amount of offset be less than what the required offset payment would be for a federal employee who is at the minimum level of pay of Grade 2, Step 1, and who is receiving augmented benefits for temporary total disability (calculated as currently $62.00)." However, the Office failed to consider 20 C.F.R. section 10.321(a) in its decision. 20 C.F.R. section 10.321(a) states:

> "Except for an overpayment resulting from forfeiture of previously paid compensation, such as provided in section 10.125, whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any resulting hardship upon such individual. . . ."

Appellant stated at her hearing that her current expenses were greater than her current income and the recovery of the overpayment would create an additional hardship for her. The Office did not consider the extent of appellant's financial expenses and obligations and the effect of the withholding of part of appellant's compensation benefits on those obligations. FECA Bulletin No. 87-19 does not allow the Office to ignore the provisions of 20 C.F.R. section 10.321(a) in insuring that recovery of an overpayment is made to minimize any resulting hardship upon appellant.[4]

On remand the Office must further develop the case record to determine the effects of the $62.00 withholding on appellant's financial obligations.

The decision of the Office of Workers' Compensation Programs dated September 11, 1987 is hereby affirmed with respect to the determination of fault in the creation of $5,506.81 overpayment. However, with respect to the rate of adjustment in the recovery of the overpayment, the decision is set aside and the case is remanded for a *de novo* decision and further development of the record consistent with this decision.

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[4] *Joyce Y. Wescott*, 39 ECAB 349 (1988).

In the Matter of CHARLES BURGER *and* TENNESSEE VALLEY AUTHORITY, SEQUOYAH NUCLEAR PLANT, Daisey, Tenn.

Docket No. 87-1789; Submitted on the Record;
Issued April 15, 1988

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant received an overpayment of compensation in the amount of $2,939.24.

On April 16, 1979 appellant, then a 47-year-old steamfitter, filed a claim for a sprained back sustained on April 1, 1979 by picking up a one-inch flange. Appellant's temporary appointment terminated on April 6, 1979. He received continuation of pay from April 9, 1979 to May 23, 1979, followed by compensation for temporary total disability until August 27, 1979. Appellant received compensation for an additional six days between August 31, 1979 and October 10, 1979, and again received compensation for total disability from October 13, 1979 to December 26, 1979.

By a compensation order dated January 28, 1980 the Office of Workers' Compensation Programs found that appellant's April 1, 1979 employment injury did not result in disability or a loss of wage-earning capacity after December 26, 1979 and terminated his compensation on that date. This decision was affirmed by a hearing representative of the Office in a July 16, 1980 decision. By compensation orders dated March 31, 1981 and April 30, 1981 the Office found that additional evidence submitted by appellant was not sufficient to warrant review of its prior decisions.

Appellant appealed to the Board which, by an order dated September 2, 1981 remanded the case to the Office for resolution of a conflict of medical opinion on the issue of whether appellant's employment injury resulted in disability from December 26, 1979 until he returned to work on February 28, 1980. [1]

After further developing the medical evidence the Office determined that appellant was entitled to compensation until his return to work on February 28, 1980. Beginning August 29, 1980 appellant missed intermittent days from work, for which he claimed compensation. The Office paid appellant compensation for these intermittent days, and for a period from February 1, 1982 to April 30, 1982 for which appellant had claimed a recurrence of disability due to his April 1, 1979 employment injury.

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[1] Docket No. 81-1473.

Appellant returned to work on May 3, 1982 with restrictions, and thereafter continued to miss intermittent days from work for which he claimed compensation. Appellant was paid compensation for these intermittent days, and for a period of absence from work from July 12, 1982 to October 4, 1982.

After his return to work on October 4, 1982 appellant continued to miss intermittent days from work, for which he claimed and was paid compensation. On July 22, 1983 appellant stopped work, and thereafter did not return to work. The employing establishment terminated his employment effective July 21, 1983. The Office began payment for temporary total disability.

On July 27, 1984 the Office received a telephone call from the employing establishment advising it that appellant had optional life insurance coverage but that the Office had not been making deductions for this insurance; the employing establishment stated that appellant was contacted and that he wanted the optional insurance. Deductions for such insurance were made commencing September 2, 1984, which were first reflected in the compensation check issued to appellant on September 30, 1984.

By letter dated October 2, 1984 the Office advised appellant that it had been notified that he was entitled to optional insurance coverage, that effective September 30, 1984 $88.60 would be deducted from each four-week compensation check for optional insurance, and that he would be advised of the amount he owed for optional insurance before September 2, 1984.

In an October 29, 1984 letter appellant advised the Office that it was his understanding that his insurance would either terminate or continue as a "compensationer" after he was in a leave-without-pay status for 12 months, which occurred in June 1984, and that he believed he only owed for optional insurance for the period beginning August 1984. Appellant submitted a pamphlet on the Federal Employees' Group Insurance Program to support his contentions.

The employing establishment submitted copies of forms by which appellant elected his life insurance. It also submitted a list of the deductions it had made for the Federal Employees' Group Life Insurance, showing that no deductions were made from appellant's weekly pay for periods from February 11, 1972 to May 6, 1972, from July 22, 1972 to October 7, 1972, or after June 23, 1973.

On October 24, 1986 the Office issued a preliminary determination that appellant had received an overpayment of compensation in the amount of $2,939.24 which occurred because no deductions were made for optional life insurance from February 7, 1982 to May 1, 1982, from July 18, 1982 to September 25, 1982, and from June 26, 1983 to September 29, 1984, and that deductions were not made from September 30, 1984 to October 25, 1986 for no reduction in basic life insurance coverage after appellant's separation from the employing establishment. The Office also preliminarily determined that appellant was at fault in the overpayment on the basis that he knew he had elected optional life insurance and that the Office was not collecting for such insurance.

In an October 29, 1986 note the Office advised appellant to address his inquiries regarding life insurance coverage to the Office of Personnel Management.

Appellant requested a hearing which was held before an Office hearing representative on March 26, 1987. Appellant testified that he agreed with the hearing representative that no deductions were made for optional insurance during the period in question, that he was unable to tell how the Office determined the amount of the overpayment, that based on his reading of his insurance policy he did not believe he had to pay for his insurance for the first year he was receiving compensation, and that he therefore thought that he first had to pay for his life insurance in July 1984 at which time he contacted the Office.

In an April 9, 1987 letter appellant stated that he would not provide the financial information requested in the Office's overpayment recovery questionnaire because the employing establishment would have access to this information.

By a decision dated May 7, 1987 and made final on May 11, 1987 an Office hearing representative found that appellant received an overpayment of compensation in the amount of $2,939.24 which arose because no deductions were made for optional life insurance from February 7, 1982 to May 1, 1982, from July 18, 1982 to September 25, 1982, and from June 26, 1983 to September 29, 1984, and because the Office deducted too little for life insurance from September 30, 1984 to October 25, 1986. The Office hearing representative further found that appellant had been entitled to the life insurance coverages for which the additional $2,939.24 in deductions should have been made, that appellant was without fault in the overpayment, and that waiver of the overpayment was not warranted because appellant had provided no arguments or evidence to establish recovery would be against equity and good conscience, and had not presented financial information to show that recovery of the overpayment would defeat the purpose of the Federal Employees' Compensation Act.

The Board finds that the case is not in posture for decision.

The Office's regulations, at 20 C.F.R. section 10.130 state "The decision [of the Office] shall contain findings of fact and a statement of reasons."

The Board finds that the Office's May 7, 1987 hearing representative decision contained inadequate findings of fact and statement of reasons. This decision fails to give a reasonable explanation of how the Office determined the amount of appellant's overpayment, thereby precluding appellant from submitting informed argument or relevant evidence on the existence or amount of the overpayment.[2]

The Board notes that Chapter 87 of Title 5 of the United States Code, titled Life Insurance, states at 5 U.S.C. section 8716 that the Office of Personnel Management may prescribe regulations which "may prescribe the time at which and the conditions under which an employee is eligible for coverage under this chapter." These regulations of the Office of Personnel Management, found at 5 C.F.R parts 870, 871, 872, and 873, set forth the formulas by which deductions for life insurance are calculated, and provide that "The Office of Personnel Management's Associate Director for Compensation or his/her designee may order correction of an error, mistake or omission. . . ."

Neither the Board nor the Office have jurisdiction to determine an employee's coverage or the amount of deductions to be made under the Federal Employees' Group Life Insurance Program.[3] These matters are within the jurisdiction of the Office of Personnel Management which has appeal procedures relating to them.

In a situation such as the present one, where appellant disputes the amount of an overpayment constituting uncollected deductions to be taken for life insurance under the Federal Employees' Group Life Insurance Program, the Office should obtain a determination from the Office of Personnel Management of the amount of such deductions including an explanation of the calculations involved. The Office may then use this amount as the amount of the overpayment, and if appellant disagrees with the amount, he may appeal to the Office of Personnel Management.

The decision of the Office of Workers' Compensation Programs dated May 7, 1987 is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

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[2] *See Ernest B. Warrington*, Docket No. 86-1284 (issued July 9, 1986).

[3] *See Mary A. Zamora*, 33 ECAB 1680 (1982). (The Board found that it had no jurisdiction to review a decision relating to the Federal Employees' Health Benefits Program on the basis that this program was under the supervision of the Office of Personnel Management.)

In the Matter of RAMON K. FARRIN, JR. *and* U.S. POSTAL SERVICE, PORTLAND POST OFFICE, Portland, Maine

Docket No. 87-636; Submitted on the Record; Issued April 22, 1988

Before MICHAEL J. WALSH, GEORGE E. RIVERS, WILLIE T.C. THOMAS

The issues are: (1) whether appellant has met his burden of proof in establishing that his disability during the periods October 14 to 25, 1981 and November 1, 1981, to March 8, 1982 due to a cervical condition, and resulting surgery occurring on December 30, 1981, which resulted in disability during the periods November 1, 1981 to March 8, 1982, were causally related to factors of his federal employment; and (2) whether appellant has met his burden of proof in establishing that his tendinitis of the upper extremities was causally related to factors of his federal employment, thereby entitling him to compensation benefits.

On October, 22, 1981 appellant, a 41-year-old postal clerk, filed a form CA-2, notice of occupational disease and claim for compensation, alleging that he developed chronic muscle strain in his shoulder and arm beginning August 1, 1981 as a result of operating a letter sorting machine. Appellant was absent from work as a result of this condition from October 14 to 25, 1981 and from November 1, 1981 to March 8, 1982.

To support his claim appellant submitted a report by Dr. James J. Henick, an osteopath, dated November 23, 1981, who reported that he treated appellant on October 14, 1981 for severe pain, and limited range of motion in his left elbow and left shoulder, and cervical neck, which appellant contended had begun in July 1981 and had worsened as his duties as a letter sorting machine operator had aggravated the pain in these areas. Dr. Henick reported further that physical examination revealed "intense muscle spasm and palpable tenderness" in the above-mentioned areas, and that x-rays of the cervical spine on November 14, 1981 were negative. The doctor diagnosed epicondylitis of the left elbow, left trapezius and shoulder girdle strain, and torsal cervical neck strain, and concluded that the symptoms were "occupation[ally] related."

In response to Office of Workers' Compensation Programs requests for the submission of factual and medical evidence to support his claim, appellant submitted a statement describing and identifying the factors of his federal employment to which he attributed the development of his condition. Appellant stated that as a letter sorter machine operator he engaged in activities which required him to do the following: keying in mail; lifting mail; pushing and pulling "U-Carts", hampers and trucks with his left arm; tying sacks of mail; and loading mail on trucks and behind the machine. Appellant further stated that in July and August 1981 he experienced difficulty turning his head to the left, and operating the muscles in the left forearm, the muscles in the back of his shoulder and neck, and the muscles in the back of the left arm. He noted that during the period toward the end of August to the middle of September 1981, he experienced pain in the affected areas when loading a mail pouch onto a cart; that the pain became increasingly more severe requiring that he seek medical treatment on October 4, 1981; and that after missing time from work, he returned to work for one week in a light-duty position. Appellant further noted that he continued to work without using his arm, and that the condition seemed to improve until early December, requiring him to be treated by a neurologist who removed a ruptured cervical disc on December 30, 1981.

Additionally, appellant submitted his hospital records documenting his hospitalization during the period December 28, 1981 to January 3, 1982. In completing appellant's hospital admissions summary, Dr. William H. Leschey, Jr., a Board-certified neurologist, stated that appellant was admitted for a cervical myelography and neurosurgical consultation, and that he had symptoms suggesting left C-6 or C-7 radiculopathy that had not responded to medical management. In the history portion of the summary, Dr. Leschey stated that appellant developed pain in his left elbow last spring, that he "did not recall any injury on his job as a mail handler," and that he ultimately developed pain which radiated down his arm into his hand. The doctor stated that he had advised appellant that "without a history of definite trauma," the possibility that his duties as a letter machine operator caused his cervical condition "seemed to be . . . tenuous." Dr. Leschey listed the admitting diagnosis as left C-6 or C-7 radiculopathy.

The hospital records further reveal that a myelogram performed during appellant's hospitalization revealed a large extradural defect at the C6-7 level on the left. Moreover, on December 30, 1981 Dr. Thomas F. Mehalic, a Board-certified neurosurgeon, performed a semi-hemi C6-7 laminotomy on the left with an excision of a herniated nucleus pulposus at C6-7 on the left, and a small foraminotomy. Appellant was discharged with a diagnosis of herniated nucleus pulposus at C6–7 on the left.

By letter of February 4, 1982 the Office advised appellant that the medical evidence of record failed to meet his burden of proof in establishing that his current condition was employment related, and thus, there was no medical evidence of record to support his claim. The Office afforded appellant an opportunity to submit medical evidence supportive of his claim.

Appellant did not submit any additional evidence.

By compensation order dated August 20, 1982 the Office denied appellant's claim on the ground that he had not met his burden of proof "in submitting sufficient reliable and substantial medical evidence to establish the claim."

On February 21, 1984 appellant filed a second notice of occupational disease and claim for compensation alleging that he developed tendinitis of his left shoulder and left arm which he attributed to the repetitive motion of his finger and arms the use of which were required when operating the letter sorting machine and performing other duties associated with his position.

In a statement which accompanied his claim form, appellant provided a detailed description of his keying duties to demonstrate the repetitiveness and frequency with which he was required to move his arms, wrists, shoulders and hands. He also stated that after keying in mail in 45-minute increments, he was required to case mail in 15-minute increments which required a lot of reaching. He concluded that his various work activities affected the aforementioned body members and his neck.

Appellant submitted a February 23, 1984 report by Dr. Henick who stated that he had treated appellant frequently in 1981 for symptoms of cervical disc pressure ultimately resulting in surgery on December 30, 1981. The doctor went on to report as follows:

> "Since that time I have seen him six times for pain in both wrists and elbows which I feel was chronic tendon strain secondary to working with a particular machine which requires working keys similar to a typewriter. When he is off the machine, his symptoms decrease."

Dr. Henick pointed out that he believed appellant's symptoms would not improve unless appellant was permitted to avoid the type of work he was required to perform.

In a subsequent report dated July 27, 1984 Dr. Henick stated that he began treating appellant in August 1980 and treated him on "numerous occasions" for symptoms which "have always been those of an acute tenosynovitis, specifically pain and tenderness, restricted motion, paresthesia, numbness and tingling from shoulder to fingertips, crepitus, [and] decrease of strength in affected parts." The doctor stated that the symptoms were "both unilateral, and at times bilateral." The doctor concluded that the subjective and objective symptoms of acute tenosynovitis were "directly related to his occupation."

The record reveals that on July 23, 1984 and February 25, 1985 appellant underwent examinations conducted by Dr. Dean J. Seibert, a Board-certified internist and preventive medicine specialist with a subspecialty in general preventive medicine, who served as the area medical officer in the northern New England area. Dr. Seibert described the symptoms appellant alleged to have experienced as a result of his operation of the letter sorting machine. The doctor discussed appellant's having undergone surgery noting that the surgery resulted in a post operative infection which delayed appellant's recovery for five months. The doctor also discussed his findings on physical examination of appellant on both occasions. Dr. Seibert concluded that appellant's symptoms consisted of "scapulocostal syndrome related principally to poor posture."

Dr. Henick referred appellant to Dr. Richard C. Flaherty, a Board-certified surgeon and plastic surgeon, who examined appellant on April 29, 1985 and after reviewing the medical evidence of record concluded:

> "In reviewing this long complicated history I think the patient does indeed have a tendinitis condition of the upper extremities involving the forearm, wrists and hands which I think is work-related tenosynovitis and most likely is secondary to working on the letter sorting machine. His symptoms are so significant at this point that I think he does quite well to be working even on a light-duty basis now."

Dr. Flaherty then set forth work restrictions for appellant to follow.

By letter of January 23, 1986, received by the Office on January 28, 1986, appellant, through his attorney, requested reconsideration of the August 20, 1982 decision.

On March 7, 1986 Dr. Peter R. Bendetson, an Office medical consultant, reviewed the evidence of record and with regard to the first claim filed by appellant concluded that there was insufficient evidence of record to substantiate that this claim and resulting surgery for a cervical herniated nucleus pulposus were causally related to factors of his federal employment. With regard to appellant's second claim, Dr. Bendetson concluded that there was a conflict in the diagnosis in that Drs. Flaherty and Henick "have made a good case for his tendinitis-chronic tendon strain to be work related" and Dr. Seibert has "a differing medical opinion." Dr. Bendetson concluded that although it appeared "that the patient may well have developed a tendinitis secondary to employment-related factors," it was difficult to determine "the extent of [appellant's] present impairment without [a recent comprehensive] evaluation."

On March 27, 1986 appellant submitted a March 7, 1986 medical note from Dr. Flaherty who stated:

> "As I am sure you know, tendinitis is a diagnosis which is very difficult to support with firm objective lab[oratory] data, and the history by the patient is of most importance. The temporal relationship between the onset of his symptoms and his work on the letter sorting machine, I feel most likely that this is a work-related tenosynovitis complaint. Nothing further that I can use with regard to objective evidence for making such a statement."

The Office declared a conflict in medical opinion between Drs. Flaherty and Henick, on the one hand, and Dr. Seibert on the other hand, based on Dr. Bendetson's medical review regarding whether appellant's tendinitis of the upper extremities were employment related. It prepared a statement of accepted facts and a list of questions and referred them, together with appellant and the case record, to Dr. Paul M. Beegel, a Board-certified orthopedic surgeon, for an impartial medical evaluation pursuant to 5 U.S.C. section 8123(a). Among the questions Dr. Beegel was requested to address was whether appellant was disabled due to any diagnosed condition and whether the surgery performed in 1981 was employment related. The statement of accepted facts discussed the claim for tendinitis and treatment administered. However, although it mentioned that appellant underwent surgery in 1981, it did not discuss the claim for the cervical condition or note the reason for the surgery.

Dr. Beegel examined appellant on June 6, 1986 and in his report of November 7, 1986 reviewed a history of the conditions claimed by appellant as employment related and the history of the medical treatment administered to appellant therefor. After discussing his findings on physical and x-ray examination of appellant, Dr. Beegel offered the following impressions:

> "IMPRESSIONS: I have reviewed x-rays from the Osteopathic Hospital dated June 10, 1986, and also films dated November 16, 1981. Insofar as I can see, there is no gross difference between these films, and both are negative. Also done at the time of the cervical spine film was a dorsal spine film. This is also negative. On the lateral view, there was some beginning spur formation in the dorsal spine region, but disk spaces were unremarkable and there is no evidence of trauma in this area. Films also were apparently taken of the foot which were in this folder dated March 6, 1984, and these were also negative.
>
> "Within the confines of the diagnosis, a diagnosis here has not been established. At present, the differential diagnosis hinges around such problems as polyneuritis, scar tissue around neural tissues from previous disk surgery, and fasciitis. Arthritis, of course, is a possibility; however, x-ray changes are so minimal as to lead one to believe that this is not the source of the patient's difficulty.
>
> "Also, it was felt that the patient's reactions at examination suggested a functional overlay in this case.
>
> "Within the confines of this situation, it is therefore without a diagnosis that one can state exactly; therefore, it is not clear whether this is an exaggeration, acceleration or precipitation of a preexisting condition. If one can establish the exact diagnosis of the preexisting condition, then one might be better able to say whether this was aggravated, accelerated or precipitated by the problem. I do not believe that this condition was precipitated by the work in question.
>
> "Obviously also, not having a specific diagnosis, one cannot say whether this is temporary or permanent. However, considering the fact that the patient has been apparently having trouble since 1980 onward, one should probably presume that the condition is permanent. Beyond question, the patient appears to be disabled by this condition, but again, clinical examination does not establish the reason for this disability any more than it establishes a finite diagnosis. The patient's disability appears to be primarily disabling on the basis of his symptomatology which is subjective in nature.
>
> "In my opinion, this patient's complaints are bizarre and unusual; they really do not fit any particular pattern. It would be

> my feeling that this patient should have further consultation with a neurologist and that perhaps he should return to Dr. Leschey for further examination and comment. Also, since I feel that much of the patient's symptomatology here is not only subjective, but also bizarre, I feel that he should be seen by a psychiatrist for an opinion as to his status and whether counselling should or could be of value to him, and psychological testing such as the MMPI [Minnesota Multiphasic Personality Inventory] might be done to see if we could not establish a better relationship as to the patient's symptomatology and his previous history.
>
> "I regret being so bizarre with this patient and so uncertain in my commentaries; however, the patient's complaints are bizarre, do not fit any pattern, and hopefully, with the previously recommended consultations, some order can be made out of a subject which appears to be quite chaotic."

By compensation order and letter decision dated November 24, 1986, which incorporated a memorandum summarizing the evidence, the Office denied modification of its prior decision finding that the submitted evidence was insufficient to warrant modification. In the accompanying memorandum the Office made the following finding:

> "As Dr. Beegel found no physiological explanation for the claimant's complaints there is no basis to modify the prior decision. In addition, no physician has provided substantial support for a relationship between factors of employment and the cervical surgery of December 30, 1981. As the only documented period of disability resulted from the cervical surgery, there is no basis for payment of compensation for this period. Finally, the claimant has worked continuously since 1982 without wage loss so there is no basis for payment of compensation for periods after March 1982 even if the claimant's subjective complaints could be causally linked to factors of employment."

The Board finds that the case is not in posture for decision.

Based on appellant's submission of medical evidence, consisting of reports by Dr. Henick, an osteopath, who supported a causal relationship between appellant's cervical condition and his employment, and by Dr. Leschey, a Board-certified neurologist, who concluded that there could only be a tenuous relationship between his cervical condition and employment without a history of trauma, the Office denied appellant's first occupational disease claim on the ground that he failed to meet his burden of proof.

Following this denial, appellant submitted medical reports by Dr. Flaherty, a Board-certified surgeon and plastic surgeon, and Dr. Henick who supported a causal connection between appellant's tendinitis of the upper extremities and his employment, which was the premise upon which he based his second claim. Additionally, the employing establishment submitted a report of a fitness-for-duty examination performed on July 23, 1984 and February 25, 1985 by the area medical officer Dr. Seibert, a Board-certified internist and preventive medicine specialist with a subspecialty in general preventive medicine. Dr. Seibert concluded that appellant's symptoms consisted of "scapulocostal syndrome related principally to poor posture." Dr. Bendetson, an Office medical consultant, reviewed the record and with respect to the first claim opined that there was insufficient evidence to establish that appellant's cervical condition and subsequent surgery for a cervical herniated nucleus pulposus were employment related. With respect to the second claim, Dr. Bendetson opined that there was a conflict in medical opinion between Drs. Flaherty and Henick versus Dr. Seibert.

Accordingly, the Office declared a conflict between Drs. Flaherty and Henick on the one hand, and Dr. Seibert on the other, and referred appellant to Dr. Beegel, a Board-certified orthopedic surgeon, who was selected as the impartial medical specialist. The Office not only requested Dr. Beegel to resolve the conflict regarding whether appellant's tendinitis was employment related, but also whether appellant was disabled from any condition and whether the 1981 surgery was employment related. Dr. Beegel reported that x-ray films of appellant's cervical and dorsal spines were negative and that he was unable to render a definitive diagnosis of appellant's condition. The doctor suggested that appellant's diagnosis "hinges around such problems as polyneuritis, scar tissue around neural tissues from previous disk surgery, and fasciitis." Additionally, he suggested that appellant's responses on examination were suggestive of a functional overlay. Dr. Beegel pointed out that since he was unable to define the diagnosis, he was unable to answer the related questions of whether there was a preexisting condition which was aggravated in some manner; however, he concluded that "this condition" was not precipitated by appellant's employment and was "primarily disabling on the basis of his symptomatology which is subjective in nature." Dr. Beegel recommended that appellant consult a neurologist and psychiatrist because his complaints were so "bizarre and unusual" and "really do not fit any particular pattern." In view of the foregoing, the doctor acknowledged that his "commentaries" were "uncertain" because appellant's complaints were bizarre and were not commensurate with any pattern. Based on this report the Office denied modification of its prior decision and found that there was no employment relationship with respect to surgery.

The Board finds that Dr. Beegel's report failed to resolve the conflict in medical evidence as the doctor was unable to make a definite diagnosis. Moreover, although the doctor was unable to diagnose the condition, he opined that "this condition" was not employment related and was disabling as a result of appellant's symptomatology. Additionally, the doctor was equivocal in that on the one hand he was unable to respond to the questions posed by the Office because he could not provide a definitive diagnosis, and then on the other hand negated an employment relationship. Dr. Beegel even acknowledged his inability to render a definitive opinion in light of the unique complaints and "pattern" thereof in appellant's case, and recommended psychiatric and neurologic consultation for appellant.

In a situation where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report.[1]

In the present case Dr. Beegel's response to Office inquiries were not definitive, were vague and equivocal in nature. Accordingly, the Office should have requested that he clarify and/or elaborate on his report, which it did not do. Nevertheless, Dr. Beegel recognized his inability to clarify the report any further by stating that appellant's complaints were too bizarre and unusual and by suggesting consultation with other medical specialists. Therefore, under these circumstances, the Office should have referred appellant for a second impartial medical evaluation.[2] The case will be remanded for that purpose.

With respect to whether appellant's disability for the periods October 14 to 25, 1981 and November 1, 1981 to March 8, 1982 due to his cervical condition resulting in surgery which caused disability from November 1, 1981 to March 8, 1982, were employment related, the Board finds that Dr. Beegel did not resolve these issues either as he was requested by the Office to do. As in the case of the conflict in medical opinion Dr. Beegel was unable to resolve the issues because of appellant's bizarre complaints and unusual pattern. Since the Office referred appellant to Dr. Beegel for an evaluation that would resolve the issues in the case, it had a responsibility to insure that this was fullfilled.[3] Thus, the Office should have referred appellant to a specialist for the resolution of these issues also. The case will be remanded to the Office to effect this end.

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[1] *Harold Travis*, 30 ECAB 1071 (1979).

[2] *Cf. Harold Travis, supra.* (The Board directed the Office to refer appellant to a second impartial medical specialist for resolution of the conflict in medical opinion after the first impartial medical specialist, in response to an Office request for clarification of his original report, advised the Office that it was not possible for him to answer the questions posed to him.)

On remand, the Office should prepare a statement of accepted facts which should entail a discussion on both claims, for the cervical condition and the tendinitis, and the reason for the 1981 surgery. This statement of accepted facts should be referred together with appellant and the case record, to a Board-certified specialist in the appropriate field of medicine not previously associated with the case to act as an impartial medical specialist to resolve the issue of whether appellant's tendinitis of the upper extremities was causally related to factors of his federal employment by a rationalized medical opinion. Additionally, this specialist, or any other appropriate specialist should be requested to examine appellant and render a rationalized medical opinion regarding whether appellant's disability from October 14 to 25, 1981 and November 1, 1981 to March 8, 1982 due to a cervical condition and resulting surgery performed on December 30, 1981 causing disability during the latter period was causally related to fators of his federal employment. Following this and any such further development as the Office deems necessary, the Office shall issue a *de novo* decision on all aspects of appellant's claim.

The decision of the Office of Workers' Compensation Programs, dated November 24, 1986, is hereby set aside; the case is remanded for further proceedings consistent with this decision of the Board to be followed by a *de novo* decision.

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[3] Since the Office referred appellant to a specialist, it had the responsibility to obtain an evaluation which would resolve the issue involved in the case. *Mae Z. Hackett*, 34 ECAB 1421 (1983). *See also Andrew G. Nastos*, 34 ECAB 519 (1983).

In the Matter of VERNON E. GASKINS *and* DEPARTMENT OF THE NAVY, NAVAL AIR REWORK FACILITY, Cherry Point, N.C.

Docket No. 88-133; Submitted on the Record;
Issued April 22, 1988

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issues are: (1) whether appellant has more than a four percent employment-related binaural hearing loss; (2) whether appellant received an overpayment of compensation in the amount of $7,911.00; and (3) if an overpayment exists, whether appellant was not "without fault," with respect to the overpayment and that therefore the overpayment was not subject to waiver.

The case has previously been on appeal before the Board. By a decision and order dated May 31, 1985 the Board found that the case was not in posture for a decision on the issue of the amount of appellant's binaural hearing loss. The Board noted that there were two audiograms, one dated August 1982 showing a 4.17 percent binaural hearing loss, the other dated January 1984 indicating a 19 percent binaural hearing loss. As the Office of Workers' Compensation Programs medical adviser failed to explain, with adequate rationale, why he selected the August 1982 audiogram in determining the percentage of loss of hearing for schedule award purposes, the case was remanded for the Office to refer appellant, together with the case record and statement of accepted facts, to an impartial Board-certified otolaryngologist, for examination and a well-rationalized opinion on the extent of appellant's employment-related hearing loss. The Board's May 31, 1985 decision and order sets forth the facts and circumstances of the case up to that time.[1]

On remand the Office referred appellant, together with the case record and statement of accepted facts, to Dr. Robert Hosea, a Board-certified otolaryngologist, for an impartial evaluation. The record indicates that appellant was examined by Dr. Hosea's associate, Dr. Walter R. Sabiston, also a Board-certified otolaryngologist. After reviewing the case record, history of injury and his findings upon physical examination Dr. Sabiston concluded in a report dated August 17, 1985 as follows:

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[1] Docket No. 85-29.

> "In summary, [appellant] has a documented progressive neurosensory hearing loss compatible with noise exposure. His exposure duration to acceptable noise levels by standards were satisfactorily adhered to. There is no record of audiologic evaluation in 1965 and there is no documentation of noise level or degree of impairment from 1965 to 1970. Since his retirement in 1980, his scores are basically unchanged."

* * *

> "Therefore, one can conclude his hearing is not much worse from that of 1980, and in fact, in some frequencies, slightly improved. This would substantiate the absence of inherent otologic disease and reconfirm the possibilities of noise-induced loss being the etiology for his hearing impairment, despite the unsupported documented degree of noise to which to prove this.
>
> "In short, we have an individual whose otologic history is absent until the 1970's. Since that time, we have documented evidence of high noise exposure but within accepted standards. There is an absence of physical explanation for this loss of hearing. Assumption would have to be then, that noise-induced loss existed prior to 1970 or that less than accepted standards of noise exposure can cause hearing loss. I believe both of the above facts exist."

Attached to Dr. Sabiston's report was a July 18, 1985 audiogram.[2]

By letter dated September 23, 1985 Dr. Norman Cardoso, an Office medical adviser, enclosed portions of the Board's decision and order dated May 31, 1985 and asked Dr. Sabiston:

> "Now, if we accept that [appellant's] noise loss is nonprogressive and this man retired according to the record and page 3 of the Remand in August of 1980, then it appears that the selected audiogram of August 27, 1982 would include all of the permanent threshold shift due to noise encountered in the federal civilian workplace, as well as any subsequent loss be it due to presbycusis or any other entity affecting hearing. Do you agree? . . . It would appear to me that having accepted Dr. Weisbrot's explanation of the defects of the earlier audiograms, then the one he selected, which was next proximal in time to

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[2] Based upon this report with the accompanying audiogram, Dr. Cardoso, an Office medical adviser, concluded that appellant had a 33 percent binaural hearing loss.

> retirement, would be the audiogram of choice. At least, it would appear logical that the audiogram selected would contain all of the damage due to noise in the federal civilian workplace, and perhaps have added to it some damage subsequent to the date of retirement."

In a letter dated October 1, 1985 Dr. Sabiston agreed that neurosensory hearing loss as a result of noise exposure should not be progressive, and that "therefore, loss of hearing since 1980 could not be attributed to that etiology prior to that time."

In a November 19, 1985 letter Dr. Cardoso wrote to Dr. Sabiston stating:

> "Although I agree with your letter, and I believe I understand what you are saying, the whole necessity for the reevaluation was due to an ECAB Remand. ECAB (Employees' Compensation Appeals Board) is mainly composed of a group of lawyers with no particular expertise in medicine or understanding of scientific matters. They review decisions on the claimant's request in an attempt to prevent justice miscarrying. In particular, they have mandated that any otologists' statement that noise-induced hearing loss is not progressive after exposure ceases cannot be accepted without supporting rationale. They do not, however, require supporting rationale if one were to state that noise-induced loss was progressive. They will not accept as adequate evidence the introduction of a medical article, even when it is a survey of the world literature that was commissioned and funded by the U.S. Department of Labor on this very point. The theory I have heard stated is that an article cannot be accepted since no physician has spoken to the causality or noncausality of this individual's hearing loss in particular. This does have some general validity, when there is no general agreement about the natural history of a particular pathology. Therefore, although I believe the opinion you have already rendered is supportive and consistent with what Doctor Weisbrot has stated, in order to effectively answer ECAB's Remand in a manner understandable to them, I shall try to underline what was done, with the rationale as I understand it. Will you then please answer in the space left under each point, or on a separate sheet if necessary, whether you believe the actions and rationale presented and upon which Dr. Weisbrot apparently acted were valid in this case, or do you

see any flaw in the reasoning used or derived from any particular matter in this case?

“(1) Apparently, though there was a chain of audiograms in this case, there was no audiogram taken upon this man's retirement. Therefore, the problem was to select the audiogram that best represented the claimant's loss due to noise exposure in the Federal civilian workplace. Now, if we accept that the damage due to noise exposure ceases to progress after exposure ceases (we must cover this point as well below), then any legitimate audiogram after the date of the cessation of exposure in the Federal civilian workplace will contain all of the damage due to noise in the Federal civilian workplace. The audiogram, if complete and valid, most proximal to the date of the cessation of exposure will contain all the damage that has been done or will ever be done, unless he returns to that employment, by noise exposure in the Federal civilian workplace. In addition, it may contain other damage due to a variety of causes including ongoing presbycusis. It should be noted that any subsequent later study of equal validity would not show an increase in causally related loss due to noise, but would in all probability should show further increase due to presbycusis and any current or subsequent pathology. In other words, the selection of this first audiogram of known reliability subsequent but most proximal to the date of retirement, when a valid representation of this individual's hearing loss, will give him the maximum award due to noise exposure in the Federal civilian workplace.

“Answer: Please base your answer on the following: Are the points above in #1 scientifically correct within the limits of your knowledge, and are they in keeping with what you have already stated? Do you believe Dr. Weisbrot's selection of the first fully documented (calibration data of machine, ASHA certification of audiologist, BC, SRTs and discrimination scores, etc.) post noise removal study of August 27, 1982 (erroneously labeled above and in the remand as August 17, 1984) was proper? Do you believe this study would contain all the damage due to noise suffered in Federal civilian employment? Do you believe that any subsequent audiogram would have a greater probability of containing extraneous subsequent noncausally related hearing loss?

“(2) As I have noted, ECAB requires that if you or I as physicians state that hearing loss due to noise is not progressive, we

> must provide rationale to support this statement. The rationale I have relied upon in this and other cases is given below:
>
> > "'(a) There are no documented studies in the literature to support suggestive deafness due to noise, and the population with significant noise-induced hearing loss is rather low in comparison to the total population that has at one time or another had significant noise exposure.
> >
> > "'(b) The observed pattern of response to noise exposure is a loss followed by partial or total improvement upon removal from noise.
> >
> > "'(c) The pattern of the induction of noise loss is that under a constant level of noxious noise, the loss induced is at first relatively large per unit time, and then subsequently less and less per unit time, thus approaching nil. This is inconsistent with the theory of progressive hearing loss.
> >
> > "'(d) Finally, histologically, repair process have been observed going on even during period of noise exposure in experimental animals.'
>
> "On the other side of the question, there is no support for the theory of the progressiveness of noise-induced hearing loss, other than occasional case reports which are not controlled studies and appear apocryphal.
>
> "Answer: Do you believe that noise-induced hearing loss is not progressive? Do you base your belief on the same rationale I have stated above? Please correct any point you feel is wrong, and if you have any other rationale either supporting or negating what I have presented, please provide it as you feel necessary. (Use separate sheet if needed.)"

In March 1986 Dr. Sabiston reviewed the November 19, 1985 letter and wrote "I agree" after each of Dr. Cardoso's opinions, followed by his initials. By letter dated April 1, 1986 Dr. Sabiston further stated:

> "In answer to your questions in your letter of November 19, 1986, regarding [appellant], the first paragraph, your points are in number one scientifically correct to the best of my knowledge, and they are in keeping with what I had stated already. I do believe that Dr. Weisbrot's selection of the first fully documented audiogram post noise removal study of August 27, 1982 erroneously labeled above and in the remand

> as August 17, 1984 was proper. I do believe that this study would have contained all the damage due to the noise suffered in federal civilian employment. I do also believe that subsequent audiograms would have a greater probability of containing extraneous subsequent noncausally related hearing loss.
>
> "I agree with all the statements you have under (2, A, B, C, D). I do believe that noise-induced hearing loss is not progressive. I do base this belief on the same rationale that you stated above, and might also add that tradition in millions of case studies has shown us that patients who have nerve deafness who use hearing aids and require continuous 80 decibels or louder gain do not show significant worsening. If patients such as the millions as have used amplifiers used them without showing appreciable loss, then the normal control, I would presume then that people without hearing aids likewise should suffer no greater deterioration."

On April 30, 1985 Dr. Cardoso reviewed the case file and concluded that Dr. Weisbrot properly selected the August 1982 audiogram in determining the percentage of appellant's hearing loss for schedule award purposes. In a report dated May 14, 1986 Dr. Cardoso further opined that appellant made a definite effort to inflate the appearance of his actual hearing loss "at least until the audiogram of August 27, 1982 which appears to be an accurate or close to accurate presentation of his actual loss."

By letter compensation order dated June 13, 1986 the Office made a preliminary determination that appellant had been paid an overpayment of compensation in the amount of $7,911.00. The overpayment occurred because appellant received a schedule award for a 19 percent hearing loss, when the schedule award should have been for four percent. A preliminary finding was made that appellant was at fault in the matter of the overpayment because there were significant discrepancies in the audiograms which could only be explained by appellant's conscious manipulation of the test responses.

On June 23, 1986 the Office received appellant's request for a hearing before an Office hearing representative. A hearing was held on April 17, 1987.

Subsequent to the hearing appellant submitted an "Overpayment Recovery Questionnaire" form dated May 11, 1987, containing the following "Without Fault Statement":

> "I do not feel I was at fault because I cooperated with all the doctors to the best of my ability. I was given an award based on doctor reports received and had no reason to doubt it was not correct. I was told I was going to be forced out of work due to my hearing loss and I decided to retire based on the hearing loss award. . . . I was awarded a 19 percent loss by your office and no reason to believe I was not entitled to the payments I was receiving."

By decision dated June 24, 1987, finalized July 2, 1987, the Office hearing representative concluded that the weight of medical evidence, as represented by the reports of Dr. Sabiston, established that appellant had no more than a four percent binaural hearing loss causally related to factors of his federal employment. As appellant had received a schedule award based on a 19 percent binaural hearing loss, appellant had been paid an overpayment of compensation in the amount of $7,904.34, the difference between what he received, $10,020.60, and his entitlement, $2,116.24.

The hearing representative also determined that appellant was not "without fault" with respect to the overpayment. He stated that the overpayment of the schedule award for 19 percent loss of binaural hearing was based upon an audiogram performed on December 7, 1987. Subsequent review of the medical record by Dr. Cardoso revealed inconsistencies in the various test results which could be explained only by appellant's conscious manipulation of the test responses. This being the case, appellant was aware that his hearing loss was not as great as 19 percent and knowingly accepted payment to which he knew he was not entitled. Based upon the financial information provided by appellant the overpayment was to be collected at the rate of $303.84 per month through deductions from appellant's ongoing retirement benefits.

By letter dated August 6, 1987 appellant requested reconsideration of the Office's decision. In support of his claim he submitted a report dated July 17, 1987 from a Dr. MacDonald, with an accompanying audiogram of the same date showing a 28 percent binaural hearing loss.

On September 2, 1987 Dr. Cardoso reviewed Dr. MacDonald's report and concluded that it failed to establish that appellant had more than a four percent binaural hearing loss causally related to factors of his federal employment. Dr. Cardoso noted that there was no evidence that noise-induced hearing loss was progressive, and that the 1982 audiogram was a more accurate reflection of appellant's hearing loss due to injurious noise exposure at his federal employment.

By compensation order dated October 6, 1987 the Office denied modification of the prior order on the grounds that the evidence submitted in support of the application was not sufficient to warrant modification of the prior decision.

The Board finds that the case is not in posture for decision and further development of the record is necessary.

The Office took the position that Dr. Sabiston's reports represented the weight of the medical evidence on the premise that under *James P. Roberts*,[3] it was entitled to special weight since Dr. Sabiston was acting as an impartial medical specialist and his report was sufficient to resolve the conflict in the medical evidence. The Board finds, however, that Dr. Sabiston may not be considered an impartial medical specialist in accordance with procedures established by the Office for the selection of such specialists.

A physician selected by the Office to serve as an impartial specialist should be one wholly free to make a completely independent evaluation and judgment.[4] In order to achieve this, the Office has developed specific procedures for the selection of impartial medical specialists designed to provide adequate safeguards against any possible appearance that the selected physician's opinion was biased or prejudiced. These procedures are set forth in the FECA Procedure Manual [5] as follows:

> "*Medical referee examination.* This type of examination is required in cases where there is a conflict of medical opinion. In contacting specialists, the MA [medical adviser] or OMA [Office medical adviser] will follow a rotation system. The services of all available and qualified Board-certified specialists will be used insofar as practicable to eliminate any possible inference of bias or partiality. This can be accomplished by selecting specialists in alphabetical order as listed in the Directory of Medical Specialists under the specialty and/or subspecialty heading in the appropriate geographic area, and repeating the process when the list is exhausted. Physicians in full-time employment with federal agencies, and physicians previously connected with the claim will not be used as medical referees. On rare occasions a noncertified specialist may be used because of his/her unusual qualifications in the particular field. This decision

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[3] 31 ECAB 1010 (1980).

[4] *Paul J. Rini*, 13 ECAB 557 (1962); 20 C.F.R. section 10.408.

[5] Chapter 3-400, Part 3.

> will be made by the MA and the reasons for his/her selection should be well-documented.
>
> " . . . If there is reason to consider a specialist's views or opinions to be reasonably predictable because of his/her writings and/or reputation in the specialty, or otherwise,[6] that specialist will not be selected. This determination will be made by the MA or higher OWCP authority. Upon the specific request of the employee or his attorney, or when otherwise indicated because of highly controversial issues, the AMA or the OMA will prepare a list of three or more certified specialists for submission to the employee or his/her attorney, permitting the employee to participate in the selection."

In the instant case, the record shows that the Office appointed Dr. Hosea to act as the impartial medical specialist and referred appellant, along with the case record and a statement of accepted facts, to him for the purpose of obtaining an opinion which would resolve the conflict of medical evidence in this case. Dr. Hosea, however, did not examine appellant, but the examination was instead performed by his associate, Dr. Sabiston who subsequently submitted a report to the Office. Thus, Dr. Sabiston was not selected by the Office to act as an impartial medical specialist in accordance with the procedures established by the Office for the selection of such specialist.

The procedures contemplate that impartial medical specialists will be selected on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and the Office.[7] Since Dr. Sabiston was not selected by rotation, this objective was not met. The procedures also provide that the Office will disqualify a physician from serving as an impartial medical specialist where there is reason to believe that the physician's views may be biased. Dr. Sabiston, however, was not subjected to this screening process contemplated by the Office procedures which provide that the employee or his attorney may object to the Office's selection of an impartial medical specialist and that they may participate in the selection of a specialist upon request. Appellant in this case, however, was examined by Dr. Sabiston without any prior notice and therefore he was not given any meaningful opportunity to object to Dr. Sabiston's use as an impartial medical specialist. Because appellant was not afforded the opportunity to participate in the selection of the impartial specialist and because Dr. Sabiston was not the impartial specialist selected by the Office, in accordance with its procedures, to permit the use of Dr. Sabiston's medical opinion would undermine the appearance of impartiality or would appear to compromise the integrity of the system for selecting impartial specialists. Dr. Sabiston therefore cannot be considered to be an impartial specialist in this case and his report may not receive any special weight.[8]

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[6] Other grounds for finding that a physician is not qualified to serve as an impartial medical specialist include: (1) the physician has signed a *Memorandum of Agreement* to perform regular services for the Office which is in force at the time of the referral (See FECA Bulletin 84-1); (2) the physician performs fitness-for-duty examinations on a regular basis for the claimant's employing establishment (See *George W. Coast*, 36 ECAB 600 (1985); and (3) the physician was an associate of a physician who had previously examined the claimant. (*See Raymond E. Heathcock*, 32 ECAB 2004 (1981)).

[7] *See* FECA Bulletin 81-43.

In addition, the Board further notes that the facts in the present case give rise to an inference that the Office sought a particular opinion from Dr. Sabiston and repeatedly asked him to clarify his opinion through inquiries which may be characterized as leading questions. After Dr. Sabiston's initial report which found that appellant's hearing loss was noise induced Dr. Cardoso wrote to Dr. Sabiston, in a letter dated September 23, 1985, giving his own opinion: (1) that noise-induced hearing loss is nonprogressive; (2) that any subsequent loss of hearing after appellant stopped work could be due to presbycusis; and (3) that it was most logical to select the August 1982 audiogram in determining the amount of appellant's hearing loss causally related to factors of his federal employment. In the letter dated November 19, 1985 Dr. Cardoso tried to further influence Dr. Sabiston's opinion by first implying that the Employees' Compensation Appeals Board remand was unnecessary and then providing Dr. Sabiston with questions that needed to be answered in the case. Dr. Cardoso then answered these questions, with accompanying rationale, and asked Dr. Sabiston if he believed the answers/rationale were valid.

The role of the Office medical adviser is to act as a consultant in reviewing cases under the Federal Employees' Compensation Act. Claims examiners make use of the services of medical advisers in adjudicating the issues of causal relationship, extent of disability, degree of permanent impairment, and suitability of work. The Office medical adviser's role is not to act in an adjudicatory capacity or address legal issues in the case and the Office should carefully observe the distinction between adjudicatory questions which are not appropriate and medical questions which are appropriate.[9]

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[8] *See Leonard Lothlen*, 37 ECAB 314 (1986), *Leonard W. Waggoner*, 37 ECAB 676 (1986).

[9] *Carlton L. Owens*, 36 ECAB 608 (1985); *Omaha M. Harris*, Docket No. 85-1192 (issued September 11, 1985)

In the instant case Dr. Cardoso's use of leading questions and an argumentative approach to Dr. Sabiston was clearly inappropriate and served to undermine his appearance of impartiality. For this reason, Dr. Sabiston's reports after August 17, 1985 are tainted by the questions and comments posed by Dr. Cardoso and should also be excluded from the record for this reason.[10]

Accordingly, the case is remanded to the Office for referral of appellant, the case record, and a statement of accepted facts to an appropriate impartial medical specialist selected in accordance with the Office's procedures. The specialist should be requested to submit a complete and well-rationalized report which resolves the conflict in the medical evidence in this case. After further development of the record as it deems necessary, the Office shall issue a *de novo* decision.

As the Office has not met its burden of proof in justifying a rescission of appellant's schedule award, the Board finds there is no overpayment of compensation.

The July 2, 1987 and October 6, 1987 decisions of the Office of Workers' Compensation Programs are set aside; and the case is remanded for further proceedings consistent with this decision.

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[10] FECA Bulletin No. 84-33 (issued July 6, 1984).

In the Matter of CHARLES A. HINTON *and* GOVERNMENT PRINTING OFFICE, Washington, D.C.

Docket No. 87-1390, Issued April 22, 1988

ORDER GRANTING REMAND

Appellant filed an application for review of a February 27, 1987 and a May 11, 1987 decision of the Office of Workers' Compensation Programs. The February 27, 1987 decision rejected appellant's claim for compensation finding that the weight of the medical evidence established that appellant's back condition, diagnosed November 8, 1983, was not causally related to his work injury of September 18, 1977. The May 11, 1987 decision denied appellant's request for a hearing because such request was not made within the thirty-day limitation of section 8124 of the Act.[1] The Office stated that it had considered the matter in relation to the issue involved and denied appellant's hearing request on the basis that it involved a medical question which may be resolved on reconsideration.

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[1] 5 U.S.C. section 8101 *et seq.*

On December 18, 1987 the Board requested a legal memorandum from the Office regarding the issue of the timeliness of appellant's hearing request. On February 25, 1988 the Director of the Office filed a motion to remand the case on the ground that the Office would issue a *de novo* decision on the subject matter of the February 27, 1987 compensation order, with copies to the appellant, his authorized representative and the employing establishment as provided for in the Federal (FECA) Procedure Manual, Chapter 2-1400(10)(f), Part 2—Claims. The Director stated that the time limitation for reconsideration, hearing, or appeal will be based on the date of issuance. He indicated that the February 27, 1987 compensation order was not properly issued because appellant's authorized representative was not sent a copy of the decision on that date. The Director noted that by letter dated April 6, 1987 appellant's authorized representative requested a hearing before the Office stating that he had not received a copy of the Office's February 27, 1987 decision from the Office. The representative noted in his letter that appellant had received the decision but believed counsel had independently received the decision from the Office.

Appellant, through his attorney, was served a copy of the Director's motion but did not respond within the allotted time.

The Board has duly considered the matter and concludes that the Director's motion should be granted.

IT IS ORDERED that the February 27, 1987 and May 11, 1987 decisions of the Office of Workers' Compensation Programs be set aside and the case remanded to the Office for the issuance of a *de novo* decision on the subject matter of the February 27, 1987 compensation order, with copies to the appellant, his authorized representative and the employing establishment as provided for in the Federal (FECA) Procedure Manual, Chapter 2—1400, Part 2—Claims.

In the Matter of EDMOND B. WAGONER *and* DEPARTMENT OF THE NAVY, MARE ISLAND NAVAL SHIPYARD, Vallejo, Calif.

Docket No. 87-1214; Submitted on the Record;
Issued April 22, 1988

Before MICHAEL J. WALSH, DAVID S. GERSON, MICHELE VON KELSCH

The issue is whether appellant has established that he sustained an injury to his right hand in the performance of duty on September 9, 1985.

On October 2, 1985 appellant, then a 31-year-old outside machinist, filed a claim for a broken right hand sustained on September 9, 1985 when he hit the wall in his apartment with his hand. Appellant was on a temporary duty assignment in San Diego at the time of his injury.

Appellant stopped work on September 16, 1985 and returned on October 15, 1985. He received continuation of pay during this absence. Medical reports showed appellant sustained a fracture at the base of his right fifth metacarpal on September 9, 1985.

By an April 23, 1986 letter the Office of Workers' Compensation Programs requested that appellant provide further information on how the September 9, 1985 injury occurred.

By a decision dated June 3, 1986 the Office found that appellant had failed to discharge his burden of proof that he sustained an injury in the performance of duty.

In a May 20, 1986 letter, received by the Office on May 28, 1986 but not considered by the Office in issuing its June 3, 1986 decision, appellant gave the following description of the circumstances of his September 9, 1985 injury:

> "I was arguing with my wife while on the way to the bathroom, she said something to me, I whirled around, with my hand hitting the wall. I didn't intend to injure myself."

In a June 25, 1986 letter appellant stated:

> ". . . the injury to my hand was the result of an argument that I had with my wife over my TDY [temporary duty assignment] in San Diego. The assignment in San Diego caused

> undue stress on my family and myself. The injury was very painful, and in no way did I do it intentionally."

In a July 11, 1986 letter the Office advised appellant that "an argument with your wife takes you out of the performance of your federal employment duties."

In response to appellant's request for a hearing, an Office hearing representative, by a September 4, 1986 decision, vacated the Office's June 3, 1986 decision and remanded the case for further development on the issue of whether appellant's injury was sustained the performance of duty.

In response to an October 7, 1986 Office inquiry asking what the argument with his wife on September 9, 1985 was about, appellant stated in a November 15, 1986 letter:

> "The argument itself was over the long hours that I was scheduled to work (12-hour shifts seven days a week). My wife and six week old daughter came down to visit me after we had been separated for four weeks prior to her arrival. My wife was very upset at the fact that we didn't have any time to spend together. The frustration mounted and this is when the argument happened. My wife stated that she felt abandoned in a strange town. I had to use my own vehicle to get to and from work, which left my wife without a car all day, which added to the mounting tension, in my frustration I whirled around accidently hitting the wall with my fist."

In response to an Office inquiry, the employing establishment stated that it had provided appellant with an apartment during his temporary assignment in San Diego, and that it did not encourage or discourage spouses to travel with employees on temporary duty assignments.

By a compensation order dated March 27, 1987 the Office found that the evidence established appellant removed himself from the performance of duty while engaged in a personal argument with his wife.

The Board finds that appellant's injury to his right hand on September 9, 1985 was not sustained in the performance of duty.

Congress, in providing for a compensation program for federal employees, did not contemplate an insurance program against any and every injury, illness, or mishap that might befall an employee contemporaneous or coincidental with his employment. Liability does not attach merely upon the existence of an employer/employee relationship.[1] The Federal Employees' Compensation Act [2] provides for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[3] The phrase "while in the performance of duty" in the Act has been interpreted to be the equivalent of the commonly found prerequisite in workers' compensation law of "arising out of and in the course of employment." [4] "In the course of employment" deals primarily with the work setting, the locale, and the time of the employee's performance of his work assignment; [5] "arising out of the employment" encompasses not only the work setting but also a causal concept, the requirement being that the employment caused the injury.[6] In deciding whether an injury is covered under the Act, the test is whether, under all the circumstances, a causal relationship exists between the employment itself, or the conditions under which it is required to be performed, and the resultant injury.[7]

In the present case, appellant's injury did not occur while he was engaged in the employing establishment's business or in the duties he was employed to perform.[8] Instead it occurred outside appellant's working hours off the premises of the employing establishment during an argument with his wife. However, as appellant's injury occurred in an apartment furnished by the employing establishment during appellant's temporary duty assignment in a place different from his regular employment, the Board will consider the question of whether his injury was sustained in the performance of duty under the "temporary assignment" rule or the "bunkhouse" rule.

As the Board has pointed out, "The so-called 'Bunkhouse rule' may be stated in general terms as follows: Where an employee is required or expected to live in quarters or premises furnished or made available by his employer and is injured during the reasonable use or occupancy of such premises, the injury arises out of and in the course of the employment. The rule is most often applied where the cause of the injury has to do with some part or appurtenance of the premises themselves. An example would be where the employee is injured through a burning of the premises." [9] The Board has further pointed out: "When awards have been made, the employee has usually been engaged in some activity of the general personal-comfort or going-and-coming type—dressing, bathing, resting, or perhaps visiting co-employees." [10]

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[1] *Minnie M. Huebner*, 2 ECAB 20 (1948).

[2] 5 U.S.C. section 8101, *et seq.*

[3] *George A. Fenske, Jr.*, 11 ECAB 471 (1960).

[4] *Bernard D. Blum*, 1 ECAB 1 (1947).

[5] *George A. Fenske, Jr.*, *supra.*

[6] *Dennis F. Rafferty*, 16 ECAB 413 (1965).

[7] In *Bernard D. Blum*, *supra*, the Board stated this test as: "Whether a particular case is or is not within the intended scope of the Act depends first upon the general test whether the particular risk may be said to be reasonably incidental to the employment, having in mind all relevant circumstances and the conditions under which the work is required to be performed."

[8] *Jeremiah Bowles*, 38 ECAB 652 (1987); *Christine Lawrence*, 36 ECAB 422 (1985).

In the present case appellant's injury was not sustained during the reasonable use or occupancy of the premises furnished by the employing establishment. The fact that the injury occurred in quarters furnished by the employing establishment was merely fortuitous, and not related to the furnished quarters itself. The Board therefore finds that appellant's September 9, 1985 injury was not sustained in the performance of duty by application of the "bunkhouse" rule.

The rule governing employees who are away from their normal posts of duty on "temporary assignments" or "special missions" at the behest of the employer is that such employees enjoy the protection of the Federal Employees' Compensation Act 24 hours a day while engaged in activities essential to or reasonably incidental to these special duties. However, not everything an employee does during the period of the "temporary assignment" or "special mission" is necessarily regarded as an incident of the assignment or mission. He is not within the protection of the Act when he engages in activities and in matters, personal or otherwise, which are not essential to nor reasonably incidental to the performance of the special mission or assignment; injuries occurring during such activities are not compensable.[11] Regarding an employee's employment situation as a special mission or temporary assignment "indicates merely that the ambit of the employment is broad, and that, unlike the more ordinary employment situations, many off-premises, after-hours acts of the employee may be incidental to the employment because such acts are incidental to the accomplishment of the mission, and because the employment exposes the employee to the particular risk." [12]

In the present case appellant's injury was sustained when he struck the wall with his fist during an argument with his wife. This activity was not essential to or reasonably incidental to his performance of his temporary assignment, and his employment did not expose him to this particular risk. Although the argument be-

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[9] *Ruth Bubier*, 2 ECAB 60 at 62 (1948).

[10] *Northon Edmund Joseph*, 26 ECAB 134 (1974).

[11] *Miss Leo Ingram*, 9 ECAB 796 (1958).

[12] *Carmen Sharp*, 5 ECAB 13 at 18 (1952).

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tween appellant and his wife concerned his use of his car to go to work and the number of hours he had to work during his temporary assignment, this is not a sufficient link to bring his injury within coverage of the Act.[13] Under all the circumstances of this case, causal relationship does not exist between the employment itself, or the conditions under which it was required to be performed, and appellant's injury.

The decision of the Office of Workers' Compensation Programs dated March 27, 1987 is affirmed.

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[13] The present situation is similar to that in *Kevin M. Kennedy*, Docket No. 87-88 (issued November 30, 1987) where the Board found that a mere discussion of work during grouse hunting by the employee and his supervisor was not enough to bring the employee's activities within the performance of duty.

In the Matter of A.D. HENDRIX *and* DEPARTMENT OF THE AIR FORCE, MCCLELLAN AIR FORCE BASE, Calif.

Docket No. 88-109; Submitted on the Record;
Issued April 25, 1988

Before MICHAEL J. WALSH, GEORGE E. RIVERS, DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly suspended appellant's rights to compensation for obstructing a medical examination.

Appellant, then a 56-year-old production controller, filed a claim on May 21, 1984 alleging a hearing loss sustained during his federal employment. Appellant noted on his claim form that he first became aware of his condition and its possible relationship to his employment on March 6, 1978, following a medical examination.

Appellant's supervisor noted on the reverse of the claim form that appellant had not been permitted to work in a high noise area since a medical evaluation on November 10, 1981. Appellant has not stopped work.

On April 2, 1985, the employing establishment submitted appellant's personnel records, from 1952 to the present, to the Office of Workers' Compensation Programs. The records included a number of audiometric studies performed since 1955.[1] The records also included summaries of appellant's employment noise exposure prepared by appellant and the employing establishment. Appellant in his summary stated that he had been exposed to noise during his employment for approximately twenty years. Appellant explained that he believed his hearing loss was due to working extended periods of time in the flight preparation area prior to 1970, and in the crash battle damage area after 1970, during which time he had been exposed to noise from jet engines, rivet guns, and high speed grinders. Appellant noted that he had not worked in a noise hazardous area since March 6, 1978.

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[1] An audiometric examination sheet dated March 24, 1960 noted a history of mechanical left ear injury "age six years car accident." The medical evidence of record does not address the relationship of this injury to the claimed hearing loss.

The noise survey report prepared by the employing establishment, pertaining to appellant's employment duties, dated October 16, 1984 stated as follows:

"Shop/Operation	Building	Sound Level (dBA)	Date of Survey
MASBSF/F-4 & F-106 Scheduling.	251	70-81 TWA	Mar./1983.
MABSCB/A-10 Scheduling.	251	76-80 TWA	Sep./1983.

> "These noise levels did not exceed the 84 dBA Time Weighted Average (TWA) limit AFR 161-35, and the Schedulers were not required to participate in the Hearing Conservation Program. They were required to wear hearing protection upon entering a Noise Hazard Area."

After the filing of his claim, appellant underwent his first audiological evaluation on December 18, 1984 at the employing establishment's audiology clinic. His evaluation was reported as follows:

> "A. D. Hendrix, a 56-year-old male, was evaluated on December 18, 1984 at this facility's Audiology Clinic as part of his retirement. Mr. Hendrix has also filed a claim for a hearing loss which he feels may be related to his federal employment. . . .
>
> "Mr. Hendrix's Audiometric Case History, which was completed on December 18, 1984, revealed intermittent noise exposure at McClellan from 1960 to 1970, as a critical parts tracer, parts router, and as a production controller. Since 1970 Mr. Hendrix has not worked in or near noise areas. The first hearing exam available for comparison purposes, dated March 24,

> 1960, indicates a mild high frequency hearing loss for the right ear and normal hearing for the left ear. No significant change in hearing occurred during Mr. Hendrix's exposure to hazardous noise at McClellan from 1960 to 1970. The last hearing exam accomplished while assigned to noise areas, dated January 23, 1970, indicates normal hearing for the left ear and a mild high frequency loss for the right ear.
>
> "Results of the December 18, 1984 Audiological Evaluation can be seen on the attached audiogram. Test results indicate nonorganic overlay (exaggerated hearing loss). Air conduction test results are not valid as evidenced by Mr. Hendrix's uncooperative test results. Speech reception thresholds indicate, at worst, only a mild hearing loss for the speech range for both ears. Speech discrimination is excellent for both ears at normal conversation speech level, further confirming the nonorganic overlay. Acoustic impedance measurements, designed to assess middle ear function, indicated normal tympanic membrane (eardrum) mobility for both ears. Acoustic reflexes (contralateral and ipsilateral stimulation) are consistent with normal hearing or a mild hearing loss, further indicating a nonorganic overlay. Results of the Stenger test (test to determine nonorganic hearing loss) were positive, indicating a nonorganic overlay (exaggerated hearing loss). . . .
>
> "Although initial pure tone test results indicate a hearing loss for both ears, further tests indicated a nonorganic overlay (exaggerated hearing loss). No decrease in Mr. Hendrix's hearing occurred from 1960 to 1970 (years Mr. Hendrix worked in/near hazardous noise areas). Due to the inconsistent and exaggerated test results, it is recommended that an auditory brain stem response test be administered (threshold method) to determine true hearing acuity. Also, in determining adjudication, it is recommended that comparison be made between the March 24, 1960 exam and the January 23, 1970 exam."

The Office on April 29, 1985 referred appellant for an otologic evaluation.

By letter dated May 13, 1985, the examining audiologist reported as follows:

> "Testing was initially begun with ascending speech reception threshold testing. . . . Pure tone testing was then completed, and resulted in results indicative of mild to moderate sloping sensorineural hearing loss. These results are in sharp contrast

> to the speech reception thresholds obtained today, as well as the discrimination results obtained at a 25 decibel presentation level. In addition, comparison of the pure tone results to the 40 decibel presentation level speech discrimination material is somewhat in contrast. Impedance testing was then completed. . . . Comparison of the 4,000 Hz acoustic reflex thresholds to the voluntary pure tone thresholds obtained today are in poor agreement, as the acoustic reflex thresholds obtained at the left ear at 105 decibels are better than Mr. Hendrix's admitted thresholds for this frequency at the left ear. Sweep frequency Bekesy audiometry was then completed and would indicate Type V tracings bilaterally. These tracings are indicative of exaggerated thresholds. After completing Bekesy audiometry, pure tone testing was again completed with these thresholds being considerably poorer than the initial pure tone results obtained today. This is indicative of poor test reliability. Please see audiogram and tympanogram for test results.
>
> "The results of today's evaluation would indicate most likely some degree of hearing loss; however, the pure tone results are thought to be exaggerated, as they are not commensurate with the speech reception thresholds obtained today, nor do they reflect the level of discrimination that Mr. Hendrix exhibited at the 25 decibel presentation levels and 40 decibel presentation levels. While Mr. Hendrix may indeed possess some degree of hearing difficulties, it is likely that his hearing is considerably better than what was observed today by either Bekesy testing or traditional pure tone testing. As previously recommended by Rosemary Johnson, Capt. USAF, it is strongly recommended that Mr. Hendrix be evaluated by brain stem auditory evoked response testing prior to any determination in this case. . . . The results of today's evaluation do not allow precise determination of the etiology of his hearing loss, as the pure tone results are thought to be somewhat exaggerated. Concurrent with this, it is difficult to determine whether a hearing aid would or would not benefit Mr. Hendrix."

On June 3, 1985, an Office medical consultant Board-certified otolaryngologist, Dr. Brian Schindler, reviewed the record and stated:

> "As consultant for the Department of Labor, I reviewed this file and find that the claimant has been exposed to hazardous noise while working at the McClellan Air Force Base as a dis-

> patcher, aircraft parts preparer and tracer and a scheduler from 1948 until the present time. On reviewing this file, I find a letter of a Noise Survey Report which indicates the claimant when he was involved in the operation of scheduling was not exposed to hazardous levels of noise. I cannot comment as to the other occupations because they are not recorded in the file. However, it has been accepted as factual that the claimant was exposed to hazardous levels of noise. There are audiograms in the file, the earliest of which dates to 1955 and shows that the claimant had normal thresholds of hearing. Subsequent audiograms appear to show the development of a high frequency hearing loss in the late 1960's and into 1970. There is then a gap of many years and an audiogram is obtained in 1984 which indicates that the claimant has significant change in his thresholds of hearing. Repeat audiogram in December 1984 shows poor correlation between the speech reception thresholds and variable responses."

* * *

> "It is my recommendation that we have an independent medical examiner try to do careful audiometry on the claimant to try to determine true and accurate thresholds of hearing. I would also like it clearly stated in the chart whether or not the claimant has been exposed to noise after 1968. It appears that in the reports from the McClellan Air Force Base that since 1968 when the claimant was working as a scheduler he has not been exposed to hazadous levels of noise."

The Office on April 10, 1986 referred appellant along with his case record, to Dr. G. Obregon, a Board-certified otolaryngologist, for an audiological evaluation and otologic examination. While informing appellant of the scheduled appointment with Dr. Obregon, the Office noted that section 8123(d) of the Federal Employees' Compensation Act provides that if an employee refuses to submit to or obstructs an examination the employee's right to compensation is suspended until such refusal or obstruction stops.

Dr. Obregon, on April 28, 1986, following an otological and audiological examination of appellant reported as follows:

> "The patient had a hearing test today using a Grayson-Stadler 10 audiometer last calibrated by Acoustic Medical in January of 1986. This showed the patient to suffer from a bilateral neurosensory hearing loss. . . . His pure tone testing definitely

> does not agree with the results obtained on the speech testing. His tympanograms were Type A normal and stapedial reflexes were present in both ears.
>
> "In view of the inconsistency between the pure tone audiometry, the patient has been scheduled for a Bekesy audiometry to be conducted on May 2.
>
> "On comparing a previous hearing test performed on the patient, it is my opinion that this patient suffers from a bilateral neurosensory hearing loss related to his occupation. The extent of the hearing loss cannot be determined at this time because of the inconsistency of his responses. As soon as the Bekesy audiometry is carried out and some of the hearing test repeated, we will be in a better position to determine the extent of the hearing loss and convey this to you."

Following the Bekesy audiometry testing performed on May 2, 1986, Dr. Obregon by letter stated:

> "Bekesy audiometry was performed today. The tracings showed severe loss of acuity bilaterally with no response above 1,000 Hz. However, Mr. Hendrix reported being able to hear the clicking sound of the Bekesy audiometry through the walls of the sound proof booth. Repeat impedance testing today showed acoustic reflexes well within normal limits for the frequencies 500 through 2,000 Hz bilaterally. No responses were obtained at 4,000 Hz. Repeat audiometry showed no responses better than 65 decibels in the low frequencies and no response at frequencies above 1,500 Hz. These results were extremely inconsistent with the results obtained on April 28 in our office. Interesting, Mr. Hendrix responded appropriately to the request to remove and hang up the earphones which was represented at 45 decibels. Bone conduction was not tested because of the inability to obtain consistent, reliable thresholds for air conduction testing.
>
> "Mr. Hendrix was unable to perform the battery of hearing tests in a reliable manner. As such we find it difficult to speculate on the extent of his hearing loss."

The Office, after receiving Dr. Obregon's reports of April 28, 1986 and May 2, 1986, wrote to Dr. Obregon on June 3, 1986 inquiring whether a brain stem auditory evoked response test would be helpful in determining the extent of appellant's hearing loss and inquiring as to the cause of the continued inconsistent testing results.

On August 22, 1986, appellant underwent auditory brain stem response testing performed by an audiologist at Dr. Obregon's office, who reported the results as follows:

> "An audiologic evaluation was repeated today, still showing inconsistent responses with speech reception thresholds much better than the pure tone results.
>
> "ABR results are consistent with a moderate to severe bilateral high frequency auditory impairment. It is important to realize that this test is most sensitive to the high frequencies and therefore it is difficult to determine the extent of the hearing loss in the low frequencies. Behavioral measures still yield inconsistent results. We have seen Mr. Hendrix for three test sessions and still have not been able to obtain reliable accurate responses from him."

Dr. Schindler reviewed the record of audiological testing conducted on appellant and in a report dated October 30, 1986 stated:

> ". . . In April 1986 the claimant saw Dr. Obregon. In his report he notes a history of noise exposure without any significant past medical history. Physical examination of the ears was normal and audiometric tests were carried out. These audiograms showed inconsistent results with poor correlation between the speech reception thresholds and the pure tone averages. Repeat audiograms on May 2, 1986 again showed poor correlation between the speech reception thresholds and the pure tone averages. The claimant did not respond voluntarily to any sounds better than 70 decibels but responded to a request to remove his earphones at approximately 45 decibels. The claimant returned to Dr. Obregon's office on August 22, 1986 at which time brain stem evoked responses showed that the claimant had responses at around 65 decibels in the right ear and 75 decibels in the left ear. Unfortunately, as noted in the report, this test is most sensitive to high frequencies and, therefore, it is difficult to determine the extent of hearing loss in the low frequencies. Behavioral measures still yield inconsistent results and we have seen Mr. Hendrix at three test sessions and still have been unable to obtain reliable accurate responses from him.
>
> "It is my opinion, though I do not know the definition of failure to cooperate with a testing procedure and obstructing, that the claimant may in fact qualify as obstructing the testing

> process as he has been unable to give consistent responses even though tested by a variety of individuals at a variety of times. It is impossible to determine with the information in the file his true and accurate thresholds of hearing."

On March 17, 1987 the Office requested an opinion from Dr. Obregon regarding the cause of the inconsistent test results and requested suggestions for methods determining of true hearing thresholds.[2]

On March 30, 1987, Dr. Obregon responded to the Office request as follows:

> "It is difficult to determine Mr. Hendrix's thresholds from his ABR test because this test is most sensitive to 3,000 and 4,000 Hz. Mr. Hendrix could very well have a moderate to severe loss for these frequencies which would be consistent with noise exposure. However, his results for the other frequencies and their correlation with his speech testing have been inconsistent. It is certainly possible that these inconsistencies result from a conscious effort to distort the test. It has been our experience that testing inconsistencies usually can be traced to either poorly calibrated equipment, inadequate instructions by the audiologist administrating the test, or an effort on the part of the patient to distort the test. It has not been our experience that patients give inconsistent results on an unconscious level. Because Mr. Hendrix has been treated so many times by so many different audiologists on different equipment, we don't feel that calibration or instructions are responsible for the inconsistencies. Because Mr. Hendrix has had at least three separate audiograms, an auditory brain stem response test, and Bekesy audiometry, we feel that little would be gained by retesting him.
>
> "This is the most frustrating case because while we are certain that Mr. Hendrix has a hearing loss, we are unable to determine its extent accurately. Please contact us if we can provide any further information."

By compensation order the Office, on August 27, 1987, suspended appellant's right to compensation on the ground that he had not complied with section 8123(d) of the Act. The Office found that appellant had obstructed the medical examination he was directed to undertake in order to determine the nature and extent of his employment-related loss of hearing.

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[2] The Office erred in referring to Dr. Obregon as an impartial medical specialist since a conflict did not exist in the medical evidence at the time of appellant's referral to Dr. Obregon. *Jordan M. Carter*, 32 ECAB 856 (1981).

The Board finds that the Office properly suspended appellant's claim for compensation pursuant to section 8123(d) of the Act.

After appellant filed his claim for hearing loss an audiological evaluation was performed at the employing establishment's health unit on December 18, 1984. Following this examination the audiologist noted inconsistent and exaggerated test results and opined that the test results revealed a nonorganic overlay. The Office then referred appellant for audiological evaluation which was performed on May 13, 1985. Following this evaluation the audiologist noted that the pure tone results were exaggerated and that the degree of appellant's hearing loss could not be determined. The Office then referred appellant to Dr. Obregon for audiological evaluation and otologic examination. On April 28, 1986 Dr. Obregon reported that appellant's pure tone testing definitely did not agree with his speech testing. Dr. Obregon thereafter scheduled appellant for Bekesy audiometry testing, which was performed on May 2, 1986. Dr. Obregon reported that the tracings showed a severe loss of acuity bilaterally, however, appellant reported inconsistently hearing the clicking sound of the Bekesy audiometry through the walls of the sound-proof booth. Dr. Obregon also noted that repeat audiometric testing revealed results "extremely inconsistent with the results obtained on April 28." The Office thereafter obtained auditory brain stem response testing, in yet another attempt to substantiate appellant's claim. Following the brain stem response testing performed on August 22, 1986, Dr. Obregon reported that appellant's behavioral measures still yielded inconsistent results. Dr. Obregon concluded that although appellant had been evaluated at three different sessions, he was still unable to obtain accurate responses. The Office thereafter asked Dr. Obregon to comment on the cause of the inconsistent results.

On March 30, 1987 Dr. Obregon responded that "It has been our experience that testing inconsistencies usually can be traced to either poorly calibrated equipment, inadequate instructions by the audiologist administering the test, or an effort on the part of the patient to distort the test. It has not been our experience that patients give inconsistent results on an unconscious level. Because Mr. Hendrix has been treated so many times by so many different audiologists on different equipment, we don't feel that calibration or instructions are responsible for the inconsistencies. Because Mr. Hendrix has had at least three separate audiograms, an auditory brain stem response test, and Bekesy audiometry, we feel that little would be gained by retesting him. . . ."

Dr. Obregon's opinion is well-reasoned and based upon the evidence of record. The Board finds that the Office was justified in determining that appellant has obstructed his audiological examinations based on Dr. Obregon's reports.

Section 8123(d) of the Federal Employees' Compensation Act specifically provides that "If an employee refuses to submit to or obstructs an examination, his right to compensation under this subchapter is suspended until the refusal or obstruction stops." [3] Based upon the medical evidence of record, the Office properly found that appellant obstructed the audiological testing.

Appellant can end the suspension of his right to compensation at any time by submitting evidence that the obstruction has ceased, for example, by submission of an audiological evaluation by an otolaryngologist which includes a reliable audiogram.[4]

The decision of the Office of Workers' Compensation Programs dated August 27, 1987, is hereby affirmed.

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[3] 5 U.S.C. section 8123.

[4] *Bernard O. Mills*, 35 ECAB 273 (1983).

In the Matter of Walter T. Chester *and* U.S. Postal Service, Post Office, Ozark, Ill.

Docket No. 87-1995; Submitted on the Record;
Issued April 26, 1988

Before George E. Rivers, David S. Gerson, Michele von Kelsch

The issue is whether appellant received an overpayment of compensation during the period July 11, 1980 through May 31, 1981 in the amount of $1,665.10 and, if so, whether appellant was at fault with respect to any such overpayment and that therefore the overpayment was not subject to waiver.

On November 9, 1973 appellant, then a 46-year-old letter carrier, filed a claim for compensation alleging that he injured both his knees on November 3, 1973 when he was involved in a motor vehicle accident in the performance of duty. Appellant stopped work on September 16, 1974 and returned to work on May 22, 1976. On October 21, 1974 the Office of Workers' Compensation Programs accepted appellant's claim for a torn lateral meniscus, right knee and appellant received temporary total disability for the period September 17, 1974 through May 22, 1976.

On January 15, 1977 appellant had a recurrence of disability causally related to the November 3, 1973 employment injury. Appellant stopped work on January 15, 1977, and except for a few days in 1983, he has not returned to work. On September 12, 1977 the Office accepted appellant's claim for recurrence of disability, and appellant was paid for temporary total disability or for impairment of his right lower extremity [1] from March 7, 1977 to the present time and continuing. As appellant's compensation payments were based upon the augmented rate for one or more dependents he received ¾ of his pay.

In a letter dated November 16, 1984 appellant wrote to the Office as follows:

> "I divorced my first wife Shirley, June 21, 1982. I don't know what day we stopped living together. In trying to gather information for you I found a 1980 calendar with notations on it. She entered Western Baptist Hospital, Paducah Ky. on June 12, 1980 and had surgery June 13, 1980. She was still in the hospital when her father died June 18 or 19, 1980. I brought her home, she slept in another bedroom and the next morning my youngest son, John took his mother, Shirley to her father's home, Rt. 3, Benton, Ill. where she was reared. Later, the last of June or first of July she came by and stayed over night in another bedroom. That was the last day she was here . . . . After several days searching, I found today the cancelled checks covering July, 1980. July 11, 1980 was the last day that Shirley wrote checks on our joint checking account . . . . From July 11, 1980 I did not provide regular contributions to her support because my attorney told me not to. She did, however, have our car and had taken savings certificates from our lock-box at the bank without my knowledge or approval and received the interest from these. These certificates were in both our names and even though she kept them and received the income from them they were reported to the IRS by the bank because my Social Security number was on them. Shirley was also receiving monthly income from an insurance (disability) policy that I had purchased some years back . . . . I married Loise on June 26, 1982, and we are still living together.

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[1] Appellant received a schedule award for 50 percent permanent disability to his right leg from November 29, 1979 to September 1, 1982.

> "Philip (DOB: December 18, 1959) is not married. He gets married next month. Philip nor I could remember about his schooling in 1980 so I called the college he attended to get the exact information on it. From the time his mother left until June 1, 1981 he was not a full-time student. From June 1, 1981 until May 11, 1984 he was a full-time student. Philip was living here and taking care of the farming (cattle) when his mother left and has continuously lived here with me until he moved to Carbondale, Ill. the week-end of November 10, 1984. From the time his mother left, I have paid 100 percent of his expenses up to June 25, 1984 . . . ."

By letter compensation order dated February 19, 1985 the Office made a preliminary determination that appellant received an overpayment of compensation in the amount of $1,665.10 during the period July 11, 1980 through May 31, 1981. The overpayment occurred because appellant was paid at the augmented (¾) rate of compensation when he was only entitled to the basic compensation rate (⅔). The Office explained that as of July 11, 1980 appellant and his wife were separated and she was no longer a dependent. The Office also noted that appellant's son Philip was over 18 during this period of time, was not a full-time student, and therefore was not a dependent. Appellant was found to be at fault with respect to the overpayment because he did not timely advise the Office of the change in the status of his dependents. That decision was made final by a decision dated June 18, 1985, which ordered that $200.00 be collected from each of appellant's compensation checks during the period July 6, 1985 through February 15, 1986.

Subsequent to the final decision appellant requested a hearing before an Office hearing representative. In support of his request appellant submitted a letter dated August 13, 1985 from his attorney which stated:

> "During this period of time [July 11, 1980 to May 31, 1981] you were still married to your wife and therefore obligated to support her under Illinois law, although she was not residing with you. She was, therefore, your dependent and certainly eligible to require payment from you, which as you know she subsequently did.
>
> "Furthermore, even though she was not living with you, you nevertheless did support her during this period, and in a sum in excess of that overpayment claim. Examples of such payment are: You paid Shirley $2,000.00 as her share of the rent

> from crop land which you and she had rented for the year 1981 and 1982. She was gone during this period and you did all the work for you and herself relating to the crop rental and you in fact were entitled to receive all the rental, but didn't do so. You paid all the insurance and taxes on the crop land and your rentals together with its farm rent for the period 1981 and 1982 even though your wife owned the property in joint tenancy with you, and under the law was obligated to pay ½ of same which she never did. This ½ would equal or exceed the amount of the compensation set-off claim. The machinery and cattle located on the farm place were fed and maintained by you, although she owed half of these expenses and did later get half the income. Finally, your wife, Shirley, when she left took with her certain certificates of deposit owned by both of you in joint tenancy. She collected and kept for herself all of the interest from these 'certificates of deposit' and you never received your share . . . ."

By decision dated April 24, 1986 the Office hearing representative found that appellant had supported his wife during the period July 11, 1980 through May 31, 1981, that he was therefore entitled to the augmented compensation that he received, and that no overpayment existed. The Chief of the Branch of Hearings disagreed with the decision and it was not issued. The case was directed to proceed with a hearing.

A hearing was held on April 10, 1987. At the hearing appellant stated that he supported his wife during the period July 11, 1980 through May 31, 1981 and that he therefore believed that he was entitled to the augmented compensation. Appellant explained that his wife took $20,000.00 worth of certificates of deposit which the two of them jointly owned, and that she received all the interest from the certificates during this period. Appellant also stated that his wife received $2,000.00 of rent from land during this period which they jointly owned. In addition, appellant stated that he paid all taxes on the interest on the certificates of deposit during this period, although he did not receive the income. Appellant noted that he and his wife were divorced on June 20, 1982 and that she received the certificates of deposit at the divorce settlement. Appellant also explained that he was aware of his obligation to inform the Office of any change in his dependency status, and that he did not inform the Office of his separation at the time it occurred. In the fall of 1980 he received an annual questionnaire from the Office (presumably a CA-1032 form) which had a question about his dependents. After consulting with his attorney he answered the questionnaire stating that his wife was a dependent.

Appellant stated that as a result of repaying the overpayment he was forced to take out a bank loan to live on and to pay taxes.

By decision dated June 24, 1987, finalized June 25, 1987, the Office hearing representative concluded that appellant had received an overpayment of compensation during the period July 11, 1980 through May 31, 1981 in the amount of $1,665.10. The overpayment occurred because appellant was being paid at the augmented rate and his wife, Shirley, was not a dependent. The hearing representative concluded that appellant was not "without fault" with respect to the overpayment because he knew of his obligation to inform the Office of any change in his dependency status and he failed to inform the Office at the time he and his wife separated.

The Board finds that appellant received an overpayment of compensation during the period July 11, 1980 through May 31, 1981 in the amount of $1,665.10.

In the present case appellant's son, Philip, was above the age of 18 and was not a full-time student during the period July 11, 1980 through May 31, 1981. Consequently, appellant was only entitled to the augmented rate of compensation during this period if his wife was considered a dependent under the Federal Employees' Compensation Act.

Section 8110(a) of the Act states that a wife may be found a claimant's dependent "if (A) she is a member of the same household as the employee; (B) she is receiving regular contributions from the employee for her support; or (C) the employee has been ordered by a court to contribute to her support." [2]

During the period between July 11, 1980 and May 31, 1981, appellant's wife Shirley was not a member of the same household as he, nor had he been ordered by a court to contribute to he support. Under the Federal Employees' Compensation Act, she could therefore only be found his dependent during this time if she received regular contributions from him for support. The record, however, fails to indicate that appellant provided regular contributions to his wife during this period. Appellant himself stated in his letter dated November 16, 1984 that he did not provide regular support to his wife because his attorney told him not to do so. He, however, stated that his wife received valuable property during this period from their joint assets, and that he therefore supported her in this manner. Section 8110(a) clearly states that these payments must be regular. This Board has held that the applicable provisions of the Act contemplates regular payments as those made with some degree of regularity for "the current necessities of life." [3] The record indicates that the valuable items given by appellant to his wife during this period represented more an equitable distribution of the couple's assets than any kind of "regular" payments for support. As appellant's wife was not a dependent during this period, appellant should have been paid at the basic rate of compensation, and he received an overpayment in the amount of $1,665.10.

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[2] 5 U.S.C. section 8110(a).

The Board further finds that appellant was not "without fault" with respect to the overpayment, and that therefore it was not subject to waiver.

In determining whether an individual is "without fault" what constitutes "fault" depends on whether the facts show that an incorrect payment resulted from:

> "(a) An incorrect statement made by the payee which the payee knew or should have known to be incorrect; (b) Failure of the payee to furnish information which the payee knew or should have known to be material; (c) Acceptance of a payment which the payee either knew or should have been expected to know was incorrect." [4]

In the present case the Office properly applied the second standard, failure of the payee to furnish information which he knew or should have known to be material. Appellant acknowledged at the hearing that he knew that he was required to inform the Office of any change in his dependency status, and yet he failed to inform the Office of his separation in July 1980. Appellant was clearly not "without fault" with respect to the overpayment.

The Federal Employees' Compensation Act [5] provides in section 8129(b) [6] that waiver of an overpayment may only be made "when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience." Conversely, no waiver of overpayment is possible if the claimant is with fault in helping to create the overpayment.[7] Since appellant was not "without fault" with respect to the overpayment, the overpayment cannot be waived.

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[3] *Maurice M. Meredith*, 12 ECAB 81 (1960).

[4] Pursuant to *Califano v. Yamasaki*, 422 U.S. 6832, 99 S. Ct. 2545 (1979) the Office established procedures to be followed in handling overpayment of compensation cases. These procedures are detailed in the Federal (FECA) Procedure Manual, Chapter 2-901, Overpayments, Part 2—Claims.

[5] 5 U.S.C. section 8101 *et seq.*

[6] 5 U.S.C. section 8129(b).

[7] *See Pirmin Theunissen*, 33 ECAB 373 (1981), and *Cheryl L. Pittman*, 35 ECAB 312 (1983).

The decision of the Office of Workers' Compensation Programs dated June 24, 1987, finalized June 25, 1987, is hereby affirmed.

In the Matter of RICARDO G. CONTRERAS *and* DEPARTMENT OF THE AIR FORCE, TINKER AIR FORCE BASE, Tex.

Docket No. 88-269; Submitted on the Record;
Issued: April 29, 1988

Before GEORGE E. RIVERS, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant was not entitled to monetary compensation benefits after June 8, 1986 on the ground that he refused to accept a valid job offer.

This is appellant's second appeal to the Board. In its decision and order dated June 17, 1987, the Board set aside the Office's July 2, 1986 decision with respect to the finding that appellant was not entitled to monetary compensation benefits after June 8, 1986 on the ground that he refused to accept suitable work and remanded the case to the Office for further development of that issue. The July 2, 1986 decision was reversed with respect to finding that appellant was not entitled to medical benefits after June 8, 1986. The September 5, 1986 decision by the Office, which denied appellant's request for a hearing before an Office hearing representative was affirmed. The Board's prior decision is hereby incorporated by reference.[1]

On remand the Office obtained evidence from appellant and the employing establishment regarding the issue of whether refusal by appellant of the job offer made by the employing establishment was reasonable on the ground that the cost of relocation was financially prohibitive.[2] Appellant submitted numerous letters in support of his contention that although he moved from Indiana, Pennsylvania to San Antonio, Texas, a move from Indiana, Pennsylvania to Oklahoma City, Oklahoma was financially prohibitive.

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[1] Docket No. 87-27 (issued June 17, 1987).

[2] See Federal (FECA) Procedure Manual, Chapter 2-813 section 6 (a)(i)(iii).

By letter received by the Office July 7, 1987 appellant noted that he had obtained legal custody of three grandchildren abandoned by their parents. By letter dated August 9, 1987 appellant stated that one of his daughters was involved in a serious auto accident in California on June 17, 1985 and that their visit to California to care for her depleted all of their available financial resources. Upon return to Pennsylvania appellant stated that they were so deeply in debt that they had to surrender their rented home and move in with their children. Appellant stated that they wanted to move to a warmer climate due to the severe cold weather and its effect on his wife's health and his back. Appellant indicated that he called the Castillos (friends in San Antonio) to inquire whether they could find the financial means to assist them in a move to a warmer climate. The Castillos offered to help appellant in any way possible if they decided to move back to San Antonio. In his letter appellant noted that he was willing to accept the position at the employing establishment if the government agreed to help financially with the move to Oklahoma, but the employing establishment denied any help at government expense. Appellant stated:

> "The Castillos promised all help we needed in returning to Texas but refused to think of my move to Oklahoma.
>
> "Our son-in-law and daughter gathered enough finances to get us to Texas only as long as the Castillos would assure them we would not be in the streets without help."

Appellant noted that they made the move in April 1986. He stated that when the Office terminated compensation benefits in June of 1986 they lost their credit and were evicted from their place (still owing the landlord $600.00 in back rent). Appellant also noted that the Castillos loaned him $4,899.00 to repay a retirement system loan made in 1961. Appellant stated that he was trying to collect child support for his grandchildren and noted he was receiving some assistance from the state of Texas.

Accompanying appellant's August 9, 1987 letter was an August 7, 1987 letter by Macario Castillo, August 4, 1987 affidavits from David Persio (appellant's son-in-law), and Maria Persio (appellant's daughter), financial information concerning property owned and land accounts held by appellant, verification of the Castillos' loan to appellant, a notice of delinquent taxes on land owned by appellant, and the accident report of appellant's daughter, Sandra, dated June 19, 1985, California.

In his August 7, 1987 letter Mr. Castillo stated that his family became close with appellant's family while being assigned to work at the employing establishment. Mr. Castillo stated:

> "In June 1984 [appellant] and his wife moved from California to Indiana, Pennsylvania where (as I understand) [appellant] was to receive some support from his son. Well, his back did not improve. In fact it kept getting worse and in March 1986 he called me here in San Antonio, from Indiana, Pennsylvania. He explained to me that he was having a very difficult time both financially and in back pain. His body, like mine, is just not accustomed to Eastern U.S. cold weather. He also mentioned to me that he might have to return to Tinker AFB in Oklahoma. That of course puzzled me because if his back could not stand the cold in Pennsylvania for sure he would suffer considerably in Oklahoma for as long as he stayed there. Nevertheless, I invited him to come here to San Antonio and stay with us for as long as he needed until he found a suitable place he could afford. He did and stayed with us approximately a month. From what I've seen since they have been here they would have never survived the first two months in Oklahoma City. Here they have qualified for welfare aid, food stamps, and assistance from me when necessary. [Appellant] and his wife Rachel are proud people and they would do anything to get off this welfare and food stamp business. [Appellant] enjoys working if only he could.
>
> "On July 31, 1986 [appellant] told me he had to reimburse the government something like $5,000.00 in order for him to qualify for full retirement pay. I loaned [appellant] the money, and he is now paying me at the rate of $165.00 a month."

David Persio (appellant's son-in-law) stated in his August 4, 1987 affidavit:

> "I, David Persio, gave my father-in-law Richard Contreras the money for him to make a move to San Antonio, Texas. (For food-gas-lodging.) The move to Texas was necessary for him both physically and financially. The weather in Pennsylvania was too hard on his back. He was in terrible pain almost all the time. It was also too expensive for him here. He was evicted from his house (which he was renting) because he was unable to keep up with all the bills, especially heat in the winter, and pay rent too. For the last couple of months he was

> here he had to move in with my family and me. Our house was barely big enough to accommodate my family let alone two more people. He knew what an inconvience it was, but had no other alternative. Finally, we gave him the money to move to a warmer climate, San Antonio, to hopefully help him physically, knowing that he would be able to get financial help from some of his very close friends there, thus he would be more able to survive financially and have a climate more suitable to his physical needs."

Maria Persio stated in her August 4, 1987 affidavit that:

> "[Appellant] who is heavily in debt and very, very sick could not move on his own. He had me with them to help with most of the expenses, and we still had trouble. And when I got married they just could not handle it financially or physically. They threw my parents out of the house they were renting. They lived with us for quite a while, and my husband and I had to get him out of this weather, his back hurt so much he could not stand straight he was in so much pain (winter especially).
>
> "They had friends in Texas that said they could help them if they could get down there, so my husband gave him the money to move (for gas, food and lodging)."
>
> * * *
>
> "We all feel that for my parents to leave Pennsylvania was the best thing for them. They really had no choice. We would not help them move to a place that they would be sleeping in the car or on the streets."

Accompanying documents indicated that appellant owned a parcel of land in California in which his state property taxes were in arrears for the period 1983 through 1987. Appellant also submitted financial information indicating that he held a minimum balance in two banks located in Texas and California.

By letter dated August 28, 1987 the Office requested that the employing establishment submit information concerning the availability of service to help families arriving in the Oklahoma area. By letter dated September 1, 1987 appellant stated that he had no funds to move to Oklahoma nor any credit available, and was given aid from his family only if he was given help from his friends in Texas. Appellant also stated that no state aid in the form of welfare would have been available at the time of their relocation since they did not have legal guardianship of their three grandsons at that time. By letter dated October 1, 1987 the employing establishment replied to the Office's August 28, 1987 letter. The employing establishment noted that they offered assistance to families only if they are in uniformed service or retired from the military. The letter listed agencies, programs and organizations which lent general and emergency assistance to families in need.

By letter compensation order dated October 23, 1987 the Office terminated appellant's monetary compensation benefits finding that appellant had not discharged his burden of proof establishing that his reason for refusal of a valid job offer was justifiable. The Office stated that appellant had shown that his financial condition prior to his move was in a "very unstable state" but indicated that this argument was not germane to the issue as to whether the actual cost of moving was prohibitive. The Office did not dispute appellant's financial condition prior to departure, but contended that this condition existed whether appellant moved to Texas or Oklahoma. The Office found that appellant did not establish that the "actual cost of moving" was prohibitive.

The Board finds that the Office improperly determined that appellant was not entitled to monetary compensation benefits after June 8, 1986 on the ground that he refused to accept a valid job offer.

The pertinent issue in the present case is whether appellant's refusal to accept the employing establishment's valid job offer (for a part-time position) may be deemed reasonable, as the "cost of relocation is financially prohibitive." [3] In support of his contention, that relocation to Oklahoma was financially prohibitive, appellant submitted evidence attesting to his poor financial condition prior to his move to San Antonio, Texas. Appellant stated, and submitted sworn statements from his family to this effect, that his move to Texas was only made affordable by the generosity of his family in contributing to the actual moving costs. The evidence demonstrates that these contributions were made with the understanding that appellant and his wife would receive assistance from their friends in Texas and not be "sleeping in the car or on the streets." The evidence of record demonstrates that appellant's family would not have contributed the financial means necessary for the actual move to Oklahoma as they stated that appellant had no friends there to assist in their relocation.

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[3] *Id.*

The Office admitted in its October 23, 1987 decision that appellant's financial condition prior to his move was in a very unstable state. The Office argues, however, that the actual cost of moving was not prohibitive as appellant had demonstrated that he could move to Texas. The Office stated that appellant's contention, that he would not be able to afford housing in the new area, was not germane to the issue of whether the actual cost of moving was prohibitive. The Board finds that the "cost of relocation" necessarily includes the cost of finding affordable housing in a new area and not merely the "actual cost of moving." The *American Heritage Dictionary,*[4] defines "relocation" as "to become established in a new residence or place of business." The Office incorrectly equated the "actual cost of moving" with the "cost of relocation" standard enunciated in the Procedure (FECA) Manual. The fact that appellant made the actual move to Texas from Pennsylvania does not necessarily indicate that the cost of relocation to Oklahoma from Pennsylvania was financially affordable. Appellant has submitted, and the Office has accepted, that appellant was in a very poor financial condition prior to the move. Appellant has established that his move to Texas was only made affordable by the generosity of his family and friends from Texas, and that these resources were not available if he had chosen to move to Oklahoma. The evidence of record demonstrates that a relocation from Pennsylvania to Oklahoma by appellant was financially prohibitive. Therefore, the Board finds that appellant reasonably refused the employing establishment's valid job offer.

The October 23, 1987 decision by the Office of Workers' Compensation Programs is hereby reversed.

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[4] 2nd edition, 1982.

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